Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN J. KOZELKA
Petitioner

v.

JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, I BRUTE ENTERPRISES INCORPORATED, CONTEMPORARY BOOKS INCORPORATED
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

QUESTIONS PRESENTED

1. Should certiorari be granted to review a ruling of the District Court, affirmed by the Second Circuit Court of Appeals, which appears to defy all principles of law, equity and reason, and which appears to result solely from discrimination, prejudice and bias against Petitioner's pro se status?

2. Should certiorari be granted to establish a precedent which will serve to rectify an apparently universal defect in the lower court system whereby pro se litigants appear to be, as a matter of policy, deprived of their right to due process?

3. Should a publisher be held liable for mental harm caused by printed material which combines group defamation with fraudulent misrepresentation, and which at the same time promotes and supports a national outrage of drug dealing and drug abuse?

4. Should a cause of action be dismissed merely because some of its allegations "appear(s) to be a restatement" of those of a libel claim which failed due to legal insufficiency?

5. Did the lower courts err in denying us a matter of law, the outrageousness of Respondents' actions, in contradiction to expert testimony which supported the opposite conclusion?

6. Did the lower courts err in denying as a matter of law, the foreseeability of Petitioner's injuries, in contradiction to expert testimony which supported the opposite conclusion?

7. Did the lower courts err in denying as a matter of law, the outrageousness of Respondents' actions, when this conclusion appears to contradict all principles of human perception and reason?

8. Did the lower courts err in denying as a matter of law, the foreseeability of Petitioner's injuries, when this conclusion appears to contradict all principles of human perception and reason?

9. Did the lower courts err in denying the existence of reliance upon misrepresentation in contradiction to Petitioner's explicitly plead allegations that such acts in reliance were taken?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, John J. Kozelka, respectfully requests that the Court issue a writ of certiorari to review the order and judgement of the United States Court of Appeals for the Second Circuit, entered on April 29, 1994, which affirmed the order and judgement of the District Court dismissing Petitioner's action.

DECISIONS BELOW

The Summary Order of the Second Circuit Court of Appeals, entered on April 29, 1994 relative to the above-entitled action, is unreported and is set forth in the Appendix affixed hereto, hereinafter abbreviated "App.Pet." (App.Pet. 1A-2A). The Ruling on Motion to Dismiss, entered by the United States District Court for the District of Connecticut on September 13, 1993 relative to the above-entitled action, is unreported and is set forth in the Appendix hereto (App.Pet. 3A-12A). The Judgement of the District Court, entered on September 16, 1993 relative to the above-entitled action, is unreported and is set forth in the Appendix hereto (App.Pet. 13A).

JURISDICTION

The order and judgement of the Second Circuit Court of Appeals relative to the above-entitled action was entered and filed on April 29, 1994. The foregoing Petition for Writ of Certiorari was filed within a 115 day period subsequent to April 29, 1994, pursuant to the order entered by this Court on June 8, 1994, granting Petitioner a 25 day extension of time within which to file his Petition. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Articles I, V, and VII of the Amendments to the U.S. Constitution and Section I of Article XIV of the Amendments to the U.S. Constitution are set forth in the Appendix hereto (App.Pet. 14A-15A). Rule 12(b) of the Federal Rules of Civil Procedure is set forth in the Appendix hereto (App.Pet. 15A). Rule 34(b) of the Local Rules of the Second Circuit Court of Appeals is set forth in the Appendix hereto (App.Pet. 15A).

The instructions issued by the Second Circuit Court of Appeals relative to pre-argument conferences, revised as of August 1993, are set forth in the Appendix hereto (App.Pet. 16A). The pertinent portions of 28 United States Code sections 144 and 455 are set forth in the Appendix hereto (App.Pet. 53A).

STATEMENT OF THE CASE

Jurisdiction of the United States District Court for the District of Connecticut relative to the foregoing case was invoked under 28 U.S.C. § 1332 (diversity of citizenship). Judgement of the District Court on the above-entitled action was entered on September 16, 1993, with Notice of Appeal being filed by Petitioner on October 8, 1993. Jurisdiction of the United States Court of Appeals for the Second Circuit relative to the foregoing case was invoked under 28 U.S.C. § 1291.

I. PROCEEDINGS BELOW

Respondents are the publishers of nationally circulated magazines and books containing bodybuilding instruction as well as pictures and other representations of bodybuilding results attainable only through the use of massive doses of anabolic steroids. Petitioner is a bodybuilder, naturally of very thin ectomorphic body type, who tried unsuccessfully to attain large muscle size while regularly purchasing and reading Respondents' publications. Petitioner alleges to have sustained great mental and emotional injury and consequential harm including loss of a marriage and loss of child visitation rights, as well as physical training injuries, caused by two lines of action committed and effected by Respondents:

1. The publication of statements ridiculing and insulting men of Petitioner's body type and disparaging their potential to ever achieve any significant bodybuilding results.

2. Publishing statements and leaving omissions which together convey the falsehood that the bodybuilding results portrayed within the magazines and books published by Respondents are attainable by natural means, without steroids.

On August 10, 1992, Petitioner filed suit against Respondent Joseph Weider, publisher and editor of the magazines at issue and author of the books at issue, seeking compensatory and punitive damages and injunctive relief restricting or prohibiting publication of the allegedly harmful materials, under theories of libel, intentional infliction of mental distress, fraud, product liability (negligence, breach of warranty and strict liability) and invasion of privacy. On September 3, 1992, Petitioner filed an Amended Complaint joining as Defendants the magazines at issue and their publishing company and the publishing company of the books at issue. On September 30, 1992, Respondents filed a motion to dismiss Petitioner's Amended Complaint, alleging lack of personal jurisdiction over Respondent Joseph Weider as well as failure to state a cause of action. On September 13, 1993, the District Court entered a ruling disposing of all pending motions. All submitted materials were accepted into the record as bearing on Respondents' Motion to Dismiss. The Motion to Dismiss was granted in full, with only the moot jurisdictional issue being ruled in Petitioner's favor (App.Pet. 5A,¶¶1-2; 6A,¶1). On September 16, 1993, judgment was entered for Respondents, dismissing Petitioner's action (App.Pet. 6A-13A). On October 8, 1993, Petitioner filed a Notice of Appeal. Oral argument of the above-entitled action on appeal was held on April 21, 1994, with argument given by Petitioner and counsel for Respondents. On April 29, 1994, the Second Circuit Court of Appeals rendered judgement on the foregoing case, affirming the District Court's ruling (App. Pet. 1A-2A).

II. STATEMENT OF FACTS

Since affidavits and exhibits were submitted in the foregoing case both by Petitioner and by Respondents, and were accepted by the District Court as bearing on adjudication of Respondents' Motion to Dismiss (See Appendix of Petitioner filed in court below, hereinafter abbreviated "Appx.", pages 11A-12A, 61A-62A. See also App.Pet. 6A, ¶1; 8A, ¶1; 12A, ¶2; 17A-32A; 35A-44A.), the Motion to Dismiss would be decided pursuant to the procedures and principles applicable to a motion for summary judgement [Rule 12(b), Fed. Rules of Civil Procedure, (App.Pet. 15A)]. The statements set forth below constitute either,

(i) Factual allegations set forth in Petitioner's Complaint, unopposed by any rebuttal evidence,

(ii) Averments of fact set forth in affidavits submitted by Petitioner, unopposed by any rebuttal evidence, or,

(iii) Facts proven prima facie through exhibits submitted by Petitioner and unopposed by any rebuttal evidence,

And as such must be taken as facts relative to adjudication of Respondents' Motion to Dismiss.

The Statement of Facts from the Brief of Plaintiff-Appellant filed in the court below is set forth in the Appendix hereto (App.Pet. 45A-52A).

REASONS FOR GRANTING THE WRIT

I. THE ERRORS OF THE DISTRICT COURT AND OF THE SECOND CIRCUIT COURT OF APPEALS RELATIVE TO THE FOREGOING CASE RESULT FROM A UNIVERSAL POLICY OF BIAS AND DISCRIMINATION WHICH EFFECTIVELY DEPRIVES PRO SE LITIGANTS OF ALL THEIR LEGAL RIGHTS AND OF THEIR ACCESS TO THE COURTS.

1. Pursuant to Section II below, any attempt to explain the District Court's "libel claim" argument without questioning the court's mental competence forces the conclusion that this is an intentional error motivated by some type of bias.

2. Pursuant to Section II(D) below, the additional three errors committed by the District Court which were summarily affirmed by the Second Circuit Court of Appeals, are so blatant as to constitute mockery and ridicule of Petitioner, and can reasonably be explained only as the result of bias.

3. The Second Circuit Court of Appeals plainly showed embarrassment over its ruling, and acknowledgment of the magnitude of its error, by emphatically asserting that the ruling was not to be cited or applied to any other case, in violation of the principle of stare decisis.

4. Failure of Petitioner's action up through the circuit appellate level was effected by the use of sham arguments involving the concerted efforts of two law firms and four members of the judicial bodies of two federal courts acting in unison. This fact constitutes statistical evidence that the bias practiced against Petitioner in the foregoing case is part of a universal phenomenon extending throughout the lower court systems.

5. The local rule of the Second Circuit Court of Appeals (App.Pet. 15A) pursuant to which pro se litigants are normally assigned five minutes for oral argument in contrast to ten minutes for counseled parties, indicates a policy of biased thinking directed against pro se litigants.

6. The local rule of Second Circuit Court of Appeals (App.Pet. 16A) pursuant to which pre-argument conferences are denied when one of the parties is proceeding pro se, further exemplifies the prejudicial attitude of the court.

7. The extensive education and training completed by an attorney or judge, which includes the difficult years of a rigorous law school curriculum, could only produce in any law school graduate, a strong affinity and compassion for fellow law school graduates.

8. The factor stated in paragraph 7 directly above, combined with the elements of human emotion, psychology and normal human fallibility, combine to produce a "buddy system" among the court's judicial body and officers, which renders the administration of justice very difficult or impossible whenever a pro se litigant opposes an attorney or appeals against the ruling of a judge.

9. This Court, being composed of a judicial body which represents the pinnacle of skill, competence and experience in the administration of justice, and which is elevated above the level where personal ties with or relations to individuals would exert an influence, is in the best possible position to intervene in a supervisory capacity and rectify a situation where pro se bias has produced injustice.

10. The lower courts desperately need the supervision and guidance of this Court to overcome the powerful human factors and unavoidable human weaknesses which contribute to the "buddy system" and result in biased rulings against pro se litigants.

11. A precedent set by this Court in the foregoing case, showing that rulings biased by the pro se factor will be reviewed on certiorari and reversed, will provide a guiding incentive to help the lower courts overcome the powerful influence to practice pro se bias.

12. It would be most regrettable if the problem of pro se bias were allowed to continue, whereby an otherwise adequate judicial system which administers impartial justice when both parties are represented, completely breaks down in pro se situations.

A. THE PROBLEM OF PRO SE BIAS WITHIN THE LOWER COURTS IS AN ISSUE OF OVERWHELMING IMPORTANCE TO THIS NATION.

1. The discriminatory practices of the courts deprive most pro se litigants of their Constitutional rights to due process, jury trial and equal protection under the laws, in violation of Articles V and VII and Section 1 of Article XIV of the Amendments to the Constitution of the United States (App.Pet. 14A-15A).

2. The practice of pro se bias effectively deprives citizens of their property without due process, in violation of Article V and Section 1 of Article XIV of the Amendments to the U.S. Constitution (App.Pet. 14A-15A) since a viable cause of action constitutes an article of property pursuant to legal definition.

> "'Property' means anything of value, including..... choses in action or other interest in or claims to wealth.....Model Penal Code § 223.0."
> "The term 'personal property' in its broadest legal signification includes.....notes, bonds, stocks and choses in action generally, including intangible property. *Bismarck Tribune Co. v. Omdahl*, N.D., 147 N.W.2d 903, 906."

Black's Law Dictionary, Fifth Edition (1979), pp. 1095, 1096

3. This Court has specifically held that the Constitution's due process guarantee requires that an impartial and detached judge preside over judicial proceedings. *Ward v. Village of Monroeville* (1972), 409 U.S. 57, 61-62; *In re Murchison* (1955), 349 U.S. 133, 136.

4. The practice of pro se bias creates the appearance of a deliberate conspiracy amongst the judicial body of the court and between the judicial body and the legal profession, and thereby demeans the image of America by violating all the principles this country stands for.

5. Observers and victims of pro se bias who do not understand its origin in normal human fallibility, will draw from their observations, the erroneous conclusion of a complete absence of justice in America.

6. Many pro se litigants belong to racial or ethnic minorities, and pro se bias effected in their cases will create the appearance that America's judicial system is corrupted by racial discrimination.

7. Should the pro se problem continue to be ignored, the miscarriage of justice which will continue to result therefrom will foment disrespect for and ridicule of the judicial system, and destroy respect for law and authority among the American people.

8. The belief in the existence of pro se bias, held by the majority of Americans, renders moot any argument us to its actual reality. The mere opinion held by the majority of people that pro se discrimination is universally practiced, is so harmful to public respect for the judiciary that certiorari would be justified to preserve the image of an honest court system.

B. THE STATUTORY AND COMMON LAW PRINCIPLES RELATIVE TO RECUSAL AND DISQUALIFICATION SUPPORT THE GRANTING OF CERTIORARI IN THE PRESENT CASE.

1. Pursuant to Sections I(7) and I(8) above, a case in which a pro se litigant opposes a counseled party exhibits factors from which any reasoning person would deduce the existence of bias in favor of the represented party. The 1975 Amendment to 28 U.S.C. § 455 (App.Pet. 53A) changed the standard for recusal from a subjective one which left to the judge "in his opinion" the decision whether it would be improper to sit [28 U.S.C. § 455 (1970)] to the present objective standard requiring disqualification whenever the judge's impartiality "might reasonably be questioned." *United States v. Cowden* (1st Cir.), 545 F.2d 257, 265, cert. denied (1976), 430 U.S. 909; H.R. Rep. No. 1453, 93d Cong., 2d Sess.2, reprinted in 1974 *U.S. Code Cong. & Ad. News* p. 6355.

> "The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man."

United States v. Cowden, supra at 265. See also *Person v. General Motors Corp.* (W.D.N.Y. 1990), 730 F.Supp. 516-517. The same "reasonable man" standard applies to disqualification under 28 U.S.C. § 144 (App.Pet. 53A). The required affidavit asserting the existence of bias must assert facts which, if true, would convince a reasonable man that bias exists. *United States v. Thompson* (3d Cir. 1973), 483 F.2d 527, 528, cert. denied (1976), 425 U.S. 944; *United States v. Cohen* (E.D. Mich. 1986), 644 F.Supp. 113, 114; *Person v. General Motors Corp.*, supra at 516-517.

2. Pursuant to Sections I(7) and I(8) above and Section II below, the foregoing case combines circumstances from which a "reasonable man" would deduce the presence of bias,

with proof of bias in fact, in the form of a flagrantly biased ruling.

3. Both legislative and common law principles relative to recusal and disqualification show the importance placed upon preserving the public image of a neutral court system by rectifying even an appearance of possible bias.

> "The new standard [imposed by 28 U.S.C. § 455(a)] was designed to promote public confidence in the impartiality of the judicial process."

Bloom, *Judicial Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 673; H.R. Rep. No. 1453, supra paragraph 1 directly above, at 6355.

> "The most serious situation (relative to judiciary bias) is.....a circumstance (which) seems not only to deny the party opposed to the judge's stated views the appearance of an impartial tribunal, but to undermine public confidence in the judiciary."

Bloom, *Judicial Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 687.

> "The protection of judicial integrity and dignity from any hint or appearance of bias is the foundation of our judicial system. Therefore, it is imperative that a judge withdraw when there is the slightest suspicion of bias, rather than continue and possibly jeopardize the judicial process. To preserve public confidence in the judiciary, 'justice must satisfy the appearance of justice'."

Burkhardt, *Judicial Disqualification* (1981), 14 J. Mar. L. Rev. 243, 254-255. See also *Idaho v. Freeman* (D. Idaho 1981), 507 F.Supp. 706; *Offut v. United States* (1954), 348 U.S. 11, 14.

> "The change (accomplished by the 1974 Amendment to 28 U.S.C. § 455) was intended to foster public confidence in the judicial system."

United States v. Cowden, supra at 265.

> "Public confidence in the judiciary is a proper objective of disqualification procedure."

Aronson, *New Approach to Disqualification* (1972), 1972 Utah L. Rev. 448, 451.

> "While an obvious goal of judicial disqualification law is to ensure that fair and impartial judges hear every case, this body of law serves an even more fundamental purpose: that of maintaining public confidence in the integrity of the judicial system. Public confidence is essential to effective functioning of the judiciary because.....the judiciary depends primarily on the willingness of members of society to follow its mandates. The judiciary could not function as a viable institution in a democracy if the public lost faith in the impartiality of its judges."

Bloom, *Judicial Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 663-664. See also *Baker v. Carr* (1962), 369 U.S. 186, 267.

> "Such an approach.....ignores the essential need to maintain public confidence in the judiciary by achieving the appearance of judicial impartiality."

Bloom, *Judicial Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 696. Thus, the potential for the foregoing case, as well as for the pro se situation in general, to devastate public faith in the judiciary, is so great as to merit the precedent of remedial action by this Court.

4. The critical necessity for intervention by this Court regarding the pro se bias problem is shown by the fact that, pursuant to Sections I(7) and I(8) above, an affidavit supporting a motion for recusal pursuant to 28 U.S.C. § 144 (App.Pet. 53A) could be submitted by every pro se party against every judge. The grounds for alleging bias are identical in every case and would satisfy the criteria for legal sufficiency set forth in paragraph 8(a) directly below. This clearly is an unacceptable procedure. It would effectively exclude pro se litigants from the courts just as certainly as does the present policy of prejudice and discrimination.

5. Any perceived prohibition against citing adverse rulings to prove bias is nullified in the instant case by the "pervasive bias" exception. The four "errors" alleged by Petitioner in the foregoing action were apparently conceived in

order to effect the preformulated result of completely dismissing Petitioner's Complaint. These "errors" thoroughly permeate the District Court's treatment of the foregoing case, extending from negation of the most fundamental foundations of a cause of action (foreseeability, reliance upon fraud) to the outrageous "libel claim" argument which defies classification as being any part of legal theory. (See Section II below.) The source of asserted bias or prejudice in a claim for judicial disqualification can originate in judicial proceedings. *United States v. Chantal* (1st Cir. 1990), 902 F.2d 1018. In *United States v. Jacobs*, a series of five consecutive errors in judicial proceedings was held to be grounds for disqualification due to an appearance of bias. *United States v. Jacobs* (9th Cir. 1988), 855 F.2d 652.

> "We do not say that a clearly evinced policy of disregarding the merits in any class of cases can withstand a recusal motion."

Phillips v. Joint Legislative Committee (5th Cir. 1981), 637 F.2d 1014, 1021, cert. denied (1982), 456 U.S. 971.

> "Rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice."

Wolfson v. Palmier (2d Cir. 1968), 396 F.2d 121, 124.

> "There is an exception to the rule that, to mandate disqualification, bias must stem from an extrajudicial source. That is when the judicial conduct shows 'pervasive bias'."

Bloom, *Judicial Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 668 note 34. See also *Whitehurst v. Wright* (5th Cir. 1979), 592 F.2d 834.

6. The courts show a great concern with promoting judicial efficiency, and cite this as a primary motive for limiting and curtailing recusal and disqualification procedures in counteracting judiciary bias.

> "The courts(').....narrow interpretation (of 28 U.S.C. § 144) draws from the arguments that.....it ensures 'orderly functioning of the judicial system'."
>
> "(The) concerns (that 'neutral and detached judges[s]'

> preside over cases) must be balanced against considerations of judicial efficiency."
> "The per se rule requiring disqualification for a judge's financial interest in a case ignores the damage done to the administration of justice through waste of judicial resources, delay and expense of deferred litigation, and loss of well-qualified judges."
> "Better solutions to the inherent problems in disqualification law.....will allow disqualification law to be more responsive to the two fundamental interests of an impartial judiciary and judicial efficiency."

Bloom, *Judical Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 666-667, 705-706.

7. A precedent set by this Court giving the clear message that rulings motivated by pro se bias will be reviewed and overturned, would encourage fair treatment of pro se parties at the trial court level. This would enhance judicial efficiency by eliminating need for the numerous pro se appeals due to unfair treatment by the trial court. These appeals presently accomplish little due to the pervasive policy of bias extending through the appellate courts.

8. The courts have moved in a direction which opposes the legislative intent behind recusal and disqualification statutes, and thus reduced the effect of legislation designed to curb judiciary bias.

a. The courts have countermanded the legislative intent behind 28 U.S.C. § 144 by strictly construing the "sufficiency" criteria to the point where automatic disqualification is barred and replaced by judicial discretion in judging the legal sufficiency of the affidavit alleging bias.

> "The.....language (of 28 U.S.C. § 144[App.Pet. 53A]) could be interpreted to provide for peremptory and au tomatic removal of judges on a party's motion."

Bloom, *Judical Disqualification* (1985), 35 Case W. Res. L. Rev. 662, 666. When Representative Callop of Indiana, during the process of legislative enactment of 28 U.S.C. § 144,

was asked whether the statute would allow district court judges discretion to determine the sufficiency of affidavits of bias, he answered:

> "No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.....it expressly provides that the judge shall proceed no further."

46 Cong. Rec. 2627 (1911).

> "An automatic disqualification process apparently was the goal of Congress in enacting the original recusal legislation."

Coberly, *Judicial Disqualification* (1977), 34 Wash. & Lee L. Rev. 1201, 1216. Despite the legislative intent behind the statute, the courts consistently construe the statute narrowly in a manner which severely hinders and limits the disqualification process. See *Resident Advisory Board v. Rizzo* (E.D.Pa. 1981), 510 F.Supp. 793, 796. Disqualification requirements demand that a judge first determine if the allegations are legally sufficient pursuant to the following criteria:

(i) The allegations of a § 144 affidavit must all be accepted as true. *Berger v. United States* (1921), 255 U.S. 22, 36.

(ii) The affidavit "must give fair support to the charge of a bent of mind (on the part of the judge) that may prevent or impede impartiality of judgement." *Berger v. United States*, supra at 33-34.

(iii) The affidavit must contain specific facts and circumstances demonstrating bias. *United States v. Azhocar* (9th Cir. 1978), 581 F.2d 735, 739-740, cert. denied (1979), 440 U.S. 907.

(iv) The facts alleged in the affidavit must show the bias is personal as opposed to judicial in nature, and must be such that, if true, they would convince a reasonable man that bias exists. *United States v. Thompson* (3d Cir. 1973), 483 F.2d 527, 528, cert. denied (1976), 425 U.S. 944.

Furthermore, the affidavit "is strictly construed against the party seeking disqualification." *Beland v. United States* (5th Cir.), 117 F.2d 958, 960, cert. denied (1941), 313 U.S. 585. In addition, the policy of not allowing the affiant's conclusions, inferences or speculations to conclusively demonstrate bias, further weakens the requirement that the affidavit be accepted as true. *United States v. Platshorn* (S.D. Fla. 1980), 488 F.Supp. 1367, 1368-1369.

b. The Fifth and Ninth Circuits have countermanded the legislative intent of 28 U.S.C. § 455 as well as the policy of the other circuits by rendering interpretations which nullify applicability of the "appearance of bias" test to the question of disqualification. Congress in 1974 adopted the American Bar Association's Code of Judicial Conduct, Canon 3C, codifying it as 28 U.S.C. § 455, with the alteration of making disqualification mandatory by changing the words "should disqualify himself", used in Canon 3C, to "shall disqualify himself" in 28 U.S.C. § 455 (App.Pet. 53A). The drafters of Canon 3C clearly intended that disqualification be governed by an appearance-of-bias as opposed to a bias-in-fact standard. The reporter's notes to the Code of Judicial Conduct state that "any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification" and that disqualification would be required if "participation by the judge in the proceeding.....creates the appearance of a lack of impartiality." E. Thiode, *Reporter's Notes to Code of Judicial Conduct* (1973), 60, 61. The legislative history of the 1974 amendments to 28 U.S.C. § 455 also supports the use of an appearance-of-bias standard. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 2, reprinted in 1974 *U.S. Code Cong. & Ad. News* 6354-6355.

The Fifth and Ninth Circuits adhere to the bias-in-fact standard by the following lines of reasoning:

(i) Interpreting § 455(b)(1) as simply providing a specific example of the general situation exemplified in § 455(a) and therefore reasoning that the disqualification standard must be identical in the two sections.

(ii) Reasoning that since § 455(b)(1) uses the same language as § 144, the bias-in-fact standard of § 144 must apply to § 455 (b)(1) as well, and therefore to § 455(a), pursuant to paragraph 8(b)(i) directly above. See *Parrish v. Board of Commissioners* (5th Cir. 1975), 524 F.2d 98, 100, cert. denied (1976), 425 U.S. 944; *Davis v. Board of School Commissioners* (5th Cir. 1975), 517 F.2d 1044, 1052; *United States v. Sibla* (9th Cir. 1980), 624 F.2d 864; *United States v. Oleander* (9th Cir. 1978), 584 F.2d 876.

This argument demands that § 455(a) and § 144 be construed in pari materia. Such an analysis is inappropriate since the statutes - one enacted in 1911 and the other amended in 1974 - can in no way be considered companion legislation that should be read together.

c. The courts in general have restructed the full legislative intent behind 28 U.S.C. § 455 by completely excluding judicial bias as a possible grounds for disqualification. The 1974 amendments to 28 U.S.C. § 455 should properly be construed to compel changes in the doctrine which totally bars the prior beliefs of a judge from effecting recusal. The existence of a previously stated opinion on an issue to be decided in the current case or an opinion concerning the case's subject matter certainly presents a situation wherein the judge's "impartiality might reasonably be questioned" pursuant to § 455(a) (App.Pet. 53A). Although the drafters of Canon 3C of the Code of Judicial Conduct rejected any change in the principle excluding judicial bias, and 28 U.S.C. § 455(b) retains the personal bias requirement of Canon 3C, Congress intended § 455(a) to set an independent standard. The legislative his-

tory explicitly states that § 455(a) was set apart from § 455(b) to provide an independent ground for judicial disqualification. The specific circumstances listed in § 455(b) were not intended to limit the much broader scope of § 455(a) which refers to any situation where impartiality could be questioned.

> "These specific situations in subsection (b) [of 28 U.S.C. § 455] are in addition to the general standard set forth in subsection (a)."

H.R. Rep. No. 1453, supra paragraph 8(b) directly above, at 6355. Nevertheless, the courts almost universally refuse to acknowledge any form of judicial bias as ground for disqualification. Pursuant to paragraph 8(b) directly above, the Fifth and Ninth Circuits have ruled that § 455(a) must be governed by the same standard as § 455(b)(1), which requires restriction to the personal bias standard, in addition to effecting the bias-in-fact restriction. The D.C. Circuit Court of Appeals summarized the adamant policy against recusal for judical bias:

> "Judges are free to decide cases involving policy questions on which they previously have expressed a view.....a federal judge will not be disqualified [pursuant to 28 U.S.C. § 144 or § 455] because of prior expression of views on a legal question."

Association of National Advertisers v. FTC (D.C. Cir. 1979), 627 F.2d 1151, 1171-1172 note 51, cert. denied (1980), 447 U.S. 921. See also *Phillips v. Joint Legislative Committee* (5th Cir. 1981), 637 F.2d 1014, cert. denied (1982), 456 U.S. 971; *Johnson v. Citizens Bank & Trust Co.* (8th Cir. 1981), 659 F.2d 865.

9. Remedial action by this Court relative to the pro se problem would, by implication, establish a policy of more stringent anti-bias measures in the courts, and thereby harmonize the above-related discrepancy between common law and the will and desires of society.

10. Judges have shown a pronounced reluctance to disqualify themselves upon motion for recusal, even in the face of overwhelming evidence or appearance of bias, often

requiring an appellate court to rule in favor of disqualification. *United States v. Jocobs* (9th Cir. 1988), 855 F.2d 652; *Brunswick Corp. v. Long* (4th Cir.), 392 F.2d 337, cert. denied (1968), 391 U.S. 966; *Laird v. Tatum* (1972), 409 U.S. 824; *United States v. Townsend* (3d Cir.1973), 478 F.2d 1072. This illustrates a fundamental problem caused by the human weakness factor: the normal inability of a person to recognize or acknowledge the existence of bias within himself, due to the laws of human emotion and psychology. These facts support the contention that pro se bias is often an unconscious practice which a judge can neither recognize, acknowledge or control of his own volition absent some outside source to provide motivation and help. The foregoing factors show necessity of intervention by a higher court in rectifying the problem of bias in general, and most particularly, that of bias against pro se litigants.

11. The extensive common law principles relative to recusal and disqualification, developed to combat bias in the courts, cannot be directly applied against pro se discrimination, since the underlying causes thereof are common to each and every judge. Pro se bias, by its universal nature, affects more litigants than the other forms and results in more extensive damage in the form of injustice and reproach upon the legal system. A precedent by this Court granting certiorari in the present case to examine the pro se problem would serve to rectify this anomaly in the image of America, and restore society's faith that the courts abhor prejudice in any form.

C. THE FOREGOING CASE PRESENTS AN IDEAL OPPORTUNITY TO EXAMINE AND INITIATE A REMEDY FOR THE PROBLEM OF PRO SE DISCRIMINATION.

1. The existence of the pro se factor in the administration of justice is often masked by the ignorance of and errors committed by pro se litigants due to their inexperience and lack of legal education.

2. The existence of pro se bias in the foregoing case stands out clearly from any results attributable to the litigant's ignorance or inexperience for the following reasons:

a. Petitioner has had legal experience involving research, study and actual litigation and courtroom experience which probably exceeds that of most pro se litigants.

b. Petitioner has submitted examples of his work, which includes drafting complaints and stating causes of action, to competent attorneys who have approved the work, and in some cases, made successful use of it.

c. Petitioner has demonstrated a level of competence in legal work by prevailing over counseled opposition in a previous pro se action. *Kozelka v. Kozelka* (1992), Conn.Super.Ct., J.D. of Tolland, No. FA-86-48828S.

d. Due to the manifestations described in paragraphs 2a through 2c directly above, any attempt to explain the dismissal of Petitioner's case as due to Petitioner's inability to state a legally sufficient claim, is completely untenable.

II. THE SECOND CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. THE "LIBEL CLAIM" ARGUMENT USED BY THE DISTRICT COURT TO DISMISS COUNT V OF PETITIONER'S COMPLAINT, AND WHICH WAS SUPPORTED AND UPHELD BY THE SECOND CIRCUIT COURT OF APPEALS, IS BOTH SHAM AND FRIVOLOUS TO THE POINT OF OUTRAGE.

1. The facts as alleged in a complaint are to be construed in the light most favorable to the plaintiff. *Amodio v. Cunningham* (1980), 182 Conn. 572. The court must construe the complaint liberally in the plaintiff's favor. *Scheuer v. Rhodes* (1974), 416 U.S. 232, 236-237. The court may grant a motion to dismiss only if it is beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson* (1957), 355 U.S. 41, 45-46; *McLain v. Real Estate Board of New Orleans Inc.* (1980), 444 U.S. 232, 246.

2. The District Court's argument used to dismiss Count V of Petitioner's Complaint is centered around the phrases "appears to be" and "if so". These phrases convey a significant element of doubt and leave open the possible interpretation that the subject of discussion is in fact not what it "appears to be." In adopting the interpretation which affirms the supposition that Petitioner's claim for product liability under negligence may be a "restatement of (Petitioner's) libel claim" in order to effect complete dismissal Petitioner's Complaint, the court has construed the Complaint in the light most favorable to Respondents, in disregard of the common law principles set forth in paragraph 1 directly above. (See App.Pet. 9A, ¶2. See also Appx. 143A-144A, ¶¶56-58.)

3. Even assuming, for the purpose of argument, that the court's choice of interpretation was justified and that Petitioner's claim for product liability under negligence is in fact a restatement of Petitioner's libel claim, dismissal of the claim violates the common law principles set forth in paragraph 1 directly above. To test the legal sufficiency of a claim, the elements actually present and stated must be compared with the elements contained within the criteria set by common law principles for establishing the given claim. A cause of action which has been dismissed for legal insufficiency is, for all purposes of the ensuing litigation, as if it had never been stated, and should not be brought back as the sole basis of an argument for dismissing another claim.

4. Petitioner's claim for product liability under negligence can in no way be construed to be or even appear to be a restatement of Petitioner's libel claim. The allegations related to steroid deception which constitute part of Petitioner's claim for product liability under negligence are absent from Petitioner's libel claim. Respondents' conduct related to steroid misrepresentation - the publication of pictures and descriptions of physical strength levels which portray results obtainable only through steroid use while speaking out against steroids and omitting any admission of or reference to their use, effects the breach of three distinct duties, neither one of which has any relation to the breach of duty which forms the basis of a libel claim:

a. A duty to protect readers form injury caused by reliance upon false representations relative to steroid use.

b. A duty to protect readers (those who don't believe the misrepresentation) from bodily harm caused by inducing the reader to use steroids.

c. A duty to protect readers, as members of society, from the harm to society caused by inducing people to violate state and federal drug statutes.

Furthermore, the injuries claimed by Petitioner in Count V of the Complaint involve the direct effect upon Petitioner of exposure to the injurious publications, in contrast to the injury to reputation upon which a libel claim is based. (See App.Pet. 48A, ¶¶14, 16-18. See also Appx. 131A-132A, ¶28; 142A, ¶50.)

B. THE DISTRICT COURT'S "LIBEL CLAIM" ARGUMENT, IF VALID, WOULD CONSTITUTE A LEGAL PRINCIPLE WHICH COULD BE CITED AS AUTHORITY IS DISMISS EVERY CAUSE OF ACTION STATED BY ANY PLAINTIFF.

1. The District Court's argument for dismissing Count V of Petitioner's Complaint could be modified and applied to negate any claim ever stated, by following the procedure set forth below:

a. Imagining a hypothetical claim consisting of some randomly selected cause of action together with a series of allegations similar or identical to those of the claim at issue.

b. Ruling the hypothetical claim to be subject to dismissal on grounds that the stated allegations are insufficient to support the stated cause of action.

c. Dismissing the claim at issue on grounds that it "appears to be a restatement of (the hypothetical) claim, and if so, must fail for the reasons discussed supra."

C. THE DISTRICT COURT'S "LIBEL CLAIM" ARGUMENT IS SPECIFICALLY NEGATED BY LEGAL AUTHORITY.

1. Authorities have expressly sanctioned the legal sufficiency of taking a proposed libel claim, one of whose elements falls short of the criteria for a viable libel suit, and relabelling the claim to produce a valid cause of action in light of the new criteria for establishing the alternate claim.

> "In attempt to circumvent the inadequacies of group defamation law, defamation plaintiffs may seek redress through claims for disparagement of goods or services or through claims of intentional infliction of emotional distress."

Marcus, *Group Defamation* (1983), 71 Cal. L. Rev. 1532, 1549. In *Fowler v. Curtiss Publishing Co.* a libel claim was restated as a claim for disparagement, and the two causes of action were evaluated separately, each in light of the criteria applicable to either libel or disparagement. While the libel count failed because of lack of reference to the individual plaintiff, the disparagement claim was dismissed because of failure to aver special damages, and not for any reasons related to libel. *Fowler v. Curtiss Publishing Co.* (D.C. Cir. 1950), 182 F.2d 377.

D. THE DISTRICT COURT'S RULINGS AS TO OUTRAGE, FORESEEABILITY OF PETITIONER'S INJURIES AND THE EXISTENCE OF RELIANCE UPON FRAUD, CONSTITUTE EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

1. The District Court denied, as a matter of law, the outrageousness of acts by Respondents which are related to illegal drug abuse, and which elicit reactions of revulsion, anger and disgust in any reasoning person. (See App.Pet. 7A, ¶3; 8A, ¶1; 39A, ¶14o; 40A, ¶14p; 41A, ¶14v; 43A, ¶¶14dl, 14fl.)

2. The District Court denied, as a matter of law, the foreseeability of Petitioner's mental distress as a reaction to acts by Respondents which would obviously devastate the self-respect and mental tranquility of virtually any person. (See App.Pet. 8A, ¶3; 39A, ¶¶14l, 14m, 14n; 40A, ¶14s; 41A, ¶ ¶14t, 14u; 42A, ¶¶14y, 14z, 14a1, 14b1; 43A, ¶¶14c1, 14g1, 14h1.)

3. The District Court, recognizing the utter incoherence and frivolity of Respondents' argument for dismissing Petitioner's misrepresentation claim, acted suo sponte to formulate a more coherent but equally sham argument in order to completely dismiss Petitioner's Complaint. (See App.Pet 8A, ¶3. See also Index to Record filed in court below, Document No.36, pages 1-2 of Supplement, and Document No. 37.) The court's repudiation of Petitioner's acts taken in reliance upon fraud effectively usurps the role of jury and proclaims allegations of Petitioner's Complaint regarding these acts to be false and untruthful.

III. THE FOREGOING CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION OVER WHICH THE COURTS ARE IN DISAGREEMENT - THAT OF ACHIEVING BALANCE BETWEEN FIRST AMENDMENT FREEDOM TO PRINT HARMFUL MATERIAL, AND THE RIGHTS OF VICTIMS HARMED BY THE MATERIAL.

1. The issue of an individual's right to publish material defamatory of a large group has consistently produced confusion and disagreement among the lower courts, which has required First Amendment interpretation provided by decisions of this Court.

2. Despite the supervision and intervention of this Court, confusion and conflict over the group defamation issue remains, as shown by the following examples:

a. In deciding the constitutionality of group libel statutes, the decision of this Court was sharply divided with strong dissents. This Court has consistently withheld from relying on the decision as a controlling precedent, and has even questioned the validity of its own ruling in this matter. Marcus, *Group Defamation* (1983), 71 Cal. L. Rev. 1532, 1546-1547, notes 86-88. See also *Beauharnais v. Illinois* (1952), 343 U.S. 250; *Garrison v. Louisiana* (1964), 379 U.S. 64.

b. Regarding the civil matter of individual recovery in group libel actions, a decision by this Court which barred recovery for the libel of a certain specified group was misinterpreted by the lower courts as a Constitutional mandate generally precluding individual recovery for group defamation. Marcus, *Group Defamation* (1983), 71 Cal. L. Rev. 1532, 1539. See also *New York Times v. Sullivan* (1962), 273 Ala. 656, 144 So.2d 25, reversed (1964), 376 U.S. 254; *Bindrim v. Mitchell* (1979), 92 Cal.App.3d 61, 86, 155 Cal.Rptr. 29, 43(Files, J.,dissenting), cert-denied (1979), 444 U.S. 984.

3. In the foregoing case, group defamation is an aggravating factor used to enhance and promote belief in fraudulent misrepresentation, in such a manner as to exacerbate the injuries caused by reliance upon the fraud. (See App.Pet. 43A, ¶¶14gl, 14hl.)

4. The publications at issue in the foregoing case have the additional harmful propensity to promote, encourage and instigate illegal drug abuse among readers who are not deceived by or who learn the truth concerning the misrepresentation. (See Section IV below. See also App.Pet. 50A-51A, ¶¶26-35; 18A, ¶¶1-5; 20A, ¶4; 21A, ¶¶4-5; 22A, ¶¶3-5; 23A, ¶¶1-5; 24A, ¶¶1-2; 33A, ¶1.)

5. Since the group libel issue alone necessitates supervision provided by the precedents of this Court to minimize confusion in the lower courts, and the group libel issue is complicated in the foregoing case by the factors described in paragraphs 3 and 4 directly above, the intervention of this Court is most certainly desirable in the instant case.

IV. THE PUBLICATION AND PORTRAYAL OF ATTRACTIVE DRUG DEPENDENT RESULTS AND OF THE METHODS FOR ATTAINING THEM RESULTS IN BODILY HARM TO INNUMERABLE PERSONS AND PROMOTES THE SOCIAL MENACE OF DRUG TRAFFICKING.

1. Respondents admit, in the article "Synthetic Heroes" on page 10 of the January 1993 issue of Muscle and Fitness magazine, that innumerable teenagers, youths and children as young as ten years of age are induced into steroid use by the representations of drug dependent physiques published by Respondents. (See App.Pet. 33A, ¶1.)

2. The mechanism by which the inducement to drug abuse occurs is fully admitted and described by Respondents as set forth in paragraphs 28 through 34 of the Statement of Facts from the Brief of Plaintiff-Appellant filed in the court below (App.Pet. 50A-51A, ¶¶28-34).

3. The drug dependent nature of the "sport" of bodybuilding and of bodybuilding competitions is fully admitted and described by Respondents in the book Competitive Bodybuilding. (See App.Pet. 18A, ¶¶1-3; 20A, ¶4; 21A, ¶¶4-5.)

4. The bodily devastation inflicted by Respondents upon both children and older victims by inducing steroid use is admitted and described by Respondents in the article "Synthetic Heroes" and expounded by renowned bodybuilding expert Robert Kennedy in the book Hardcore Bodybuilding. (See App.Pet. 33A, ¶¶1-3; 28A, ¶2; 30A, ¶2; 31A, ¶¶5-6.)

5. The detriment which Respondents inflict upon society by promoting steroid trafficking and dealing is admitted by Respondents in the article "Synthetic Heroes" and expounded by bodybuilding expert Robert Kennedy in the book Hardcore Bodybuilding. (See App.Pet. 33A, ¶1; 34A, ¶1; 29A, ¶¶5-7)

6. Many readers are deceived by and rely upon Respondents' misrepresentation of drug dependent results. These victims suffer embarrassment and humiliation which often forces them into steroid use to rebuild their self-esteem and to repair their reputation.

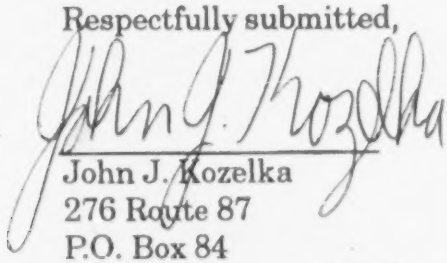
7. A precedent set by this Court in imposing greater liability upon publishers of dishonest and harmful material would serve to discourage and inhibit the promotion of steroid abuse, and would serve to discourage and inhibit the promotion of steroid abuse, and would prevent innumerable persons from suffering mental and physical harm.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to review the order and judgement of the United States Court of Appeals for the Second Circuit relative to the above-entitled action, that the Questions Presented be decided by this Court, and that the foregoing case be remanded to the District Court for trial.

Dated this 19th day of August, 1994.

Respectfully submitted,



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Petitioner Pro Se

No._____

In The

Supreme Court of the United States

October Term, 1994

JOHN J. KOZELKA,
Petitioner

v.

JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, I BRUTE ENTERPRISES INCORPORATED, CONTEMPORARY BOOKS INCORPORATED,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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Excerpt From the Book Competitive Bodybuilding by Joe Weider (Contemporary Books, 1984), Filed In the United States District Court As Exhibit A 17A

Excerpts From the Pharmaceutical Manual Facts and Comparisons (Facts and Comparisons, 1992), Filed In the United States District Court As Exhibit P 25A

Excerpt From the Book Hardcore Bodybuilding By Robert Kennedy (Sterling Publishing Co.), Filed In the United States District Court as Exhibit b 28A

Excerpt From Editorial Article By Joe Weider, Published In the January 1993 Issue of Muscle and Fitness Magazine, Filed In the United States Court of Appeals For the Second Circuit As Exhibit e Affixed to Petitioner's Motion For Hearing In Banc 33A

Affidavit of Weight Training Expert Frank Gancarz, Filed In the United States District Court 35A

Statement of Facts From Petitioner's Brief Filed In the United States Court of Appeals 45A

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28 United States Code Section 455 53A

ORDER AND JUDGEMENT OF THE COURT OF APPEALS APRIL 29, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 29th day of April, on thousand nine hundred and ninety-four.

PRESENT:

HON. THOMAS J. MESKILL,
HON. FRANK X. ALTIMARI,
HON. JOSEPH M. McLAUGHLIN,
Circuit Judges

JOHN J. KOZELKA,

Plaintiff-Appellant,

93-9066

-v.-

JOSEPH WEIDER; MUSCLE AND FITNESS MAGAZINE; FLEX MAGAZINE; I BRUTE ENTERPRISES and CONTEMPORARY BOOKS INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the District for Connecticut.

This cause came to be heard from the transcript of record from the United States District Court for the District of Connecticut and was argued by plaintiff-appellant pro se and by counsel for defendants-appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of the district court is AFFIRMED.

Plaintiff-appellant John J. Kozelka appeals from a judgement entered in the United States District Court for the District of Connecticut (Dorsey, J.) dismissing his complaint alleging various tort claims. Kozelka claims that various statements made by defendants-appellees, publishers of bodybuilding books and magazines, constitute libel, intentional infliction of emotional distress, misrepresentation, injurious falsehood, breaches of express and implied warranties and strict liability, negligence or recklessness, and invasion of privacy.

We affirm the judgement for substantially the same reasons set forth by the district court in its "Ruling on Motion to Dismiss" dated September 13, 1993, entered as a judgement on September 16, 1993.

/s/ Thomas J. Meskill
HON. THOMAS J. MESKILL,
/s/ Frank X. Altimari
HON. FRANK X. ALTIMARI,
/s/ Joseph M. McLaughlin
HON. JOSEPH M. McLAUGHLIN,
Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

RULING OF THE DISTRICT COURT ON MOTION TO DISMISS SEPTEMBER 13, 1993

UNITED STATED DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. KOZELKA :

-vs- : Docket No. 2:92CV00678 (PCD)

JOSEPH WEIDER, et al. :

RULING ON MOTION TO DISMISS

Plaintiff seeks declaratory and injunctive relief, compensatory and punitive damages from defendants Joseph Weider, Muscle and Fitness Magazine, Flex Magazine, I Brute Interprises Inc., and Contemporary Books Inc. He alleges libel, intentional infliction of mental suffering, misrepresentation and deceit, injurious falsehood, negligent, reckless, wanton and willful distribution of a defective product, breach of express warranty, breach of implied warranty, strict product liability, and violation of his right of privacy. Defendants move to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6).

I. Background

Plaintiff is a bodybuilder with ectomorphic characteristics. To increase his size, he engaged in an intensive training regimen, unsuccessfully. He consulted writings of Weider, as well as the magazines Muscle and Fitness and Flex, which are owned by I Brute Enterprises and which list Weider as their publisher. Plaintiff alleges that various statements and omissions in these sources have caused him great mental anguish and disturbance, resulting in, inter alia, the breakup of his marriage and the loss of visitation rights with his son. He further alleges that such statements and omissions violated an express and implied warranty, constituted a defec-

tive product, and violated his right to privacy and that of the purported class of ectomorphs. He also alleges that these writings have contributed to civil and criminal disturbances throughout the United States.

II. Discussion

A. Rule 12(b)(2)

Defendant Weider moves to dismiss for lack of personal jurisdiction under Federal Rule 12(b)(2). The law of the forum state governs the exercise of in personam jurisdiction in a diversity action. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 223 (2d Cir.1963). Defendant's jurisdictional challenge requires the court to engage in a two-part inquiry. First, the court must determine whether the state's long-arm statute reaches defendant. Second, if the statute applies, it must be determined whether the exercise of jurisdiction comports with due process. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945); *Greene v. Sha-na-na*, 637 F. Supp. 591, 595 (D. Conn. 1986); *Lombard Bros. v. General Assessment Management Co.*, 190 Conn. 245, 250 (1983). Plaintiff bears the burden of a prima facie showing of jurisdiction. *Hoffritz*, 753 F.2d at 57. All pleadings and affidavits are construed, and all ambiguities resolved, in plaintiff's favor. Id.

1. Long-Arm Statute

Conn. Gen. Stat. § 52-59b provides that a court may exercise personal jurisdiction over any nonresident who:

> (1) Transacts any business within the state; or (2) commits a tortious act within the state . . . or (3) commits a tortious act outside the state causing injury to a person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (A) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have con-

> sequences in the state and derives substantial revenue from interstate or international commerce.

Conn. Gen. Stat. § 52-59b(a). Plaintiff states that Weider is the publisher of Muscle and Fitness magazine which is sold in Connecticut, that Weider derives substantial revenue from such sales, that each issue restates the "Weider lifestyle," and that each issue solicits business for products bearing Weider's name.

The amended complaint, viewed in the light most favorable to plaintiff, establishes a basis for personal jurisdiction over Weider. Advertising in publications circulated in Connecticut seeking reader response is sufficient to support personal jurisdiction under § 52-59b(a)(1). *Miller v. Meadowlands Car Imports, Inc.*, 822 F. Supp. 61, 65 (D. Conn. 1993); *Luders v. White Lightning Aircraft Corp.*, 1991 WL 27241 (Conn. Super. 1991).

In personam jurisdiction over Weider also exists pursuant to § 52-59b(a)(3). Circulation of a magazine is sufficient to support personal jurisdiction in an action based on its contents. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-81 (1984) (finding personal jurisdiction over defendant whose only connection with state was circulation of magazine that she assisted in producing).

2. Due Process

Due process requires that the exercise of personal jurisdiction be supported by "minimum contacts" by defendant with the forum state, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), such that a suit in that forum will not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). To meet this requirement, "the defendant's conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Plaintiff has submitted evidence that Weider does a sufficient amount of business in Connecticut to reasonably anticipate being haled into court here. In Keeton, it was noted that where a defendant has "continuously and deliberately exploited the [state's] market, it must reasonably anticipate being haled into court here in a libel action based on the contents of its magazine." Id. (citing World-Wide Volkswagen, 444 U.S. at 297-98).

B. Rule 12(b)(6)

Defendants move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Testing whether plaintiff has stated a claim upon which relief may be granted, such a motion must be decided solely on the facts alleged, *Goldman v. Belden*, 754 F.2d 1059, 1065-66 (2d Cir. 1985), and should be granted only where no set of facts consistent with the allegations would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The issue is not whether plaintiff will prevail, but whether he should be afforded the opportunity to offer evidence to prove his claims. Id.

Plaintiff's nine-count amended complaint essentially alleges that a series of statements (e.g., ectomorphs will not become world class bodybuilders) and deceptive omissions (e.g., failure to state that many world class bodybuilders in the magazines used steroids) have constituted either an attack on him or a denial of his rights.

1. Libel (Count I)

Plaintiff alleges libel based on various statements concerning the ability of ectomorphic bodybuilders. He does not allege that the statements refer to him specifically. Rather, he alleges that as a member of the "class" of ectomorphs who has trained with disappointing results, he has been defamed. Under Connecticut law, defamatory words used broadly with respect to a general class, without personal application, give rise to no cause of action by a member of that class. *Bowen v. Poli-New England Theatres, Inc.*, 12 Conn. Supp. 28 (1943)

(attorneys alleging that motion picture defamed their profession did not state cause of action). There is no valid claim where "there is nothing that points, directly or by innuendo, to that individual." Id.

Recovery under a group libel theory is possible only if (1) the group or class is so small that the matter can reasonably be understood to refer to the individual plaintiff; or (2) the plaintiff is either explicitly or implicitly singled out. See, *e.g., Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) (citing Restatement (Second) of Torts § 564A (1977)). Defendants' statements have not singled out plaintiff, either explicitly or implicitly. Construing the allegations of the amended complaint in the light most favorable to plaintiff, no reasonable reader would understand the statements to refer to plaintiff, or as being intended to do him harm. Hence plaintiff has failed to state a claim for libel.

2. Intentional Infliction of Mental Suffering (Count II)

A plaintiff may recover for intentional infliction of emotional distress if: (1) the defendant intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme or outrageous; and (3) the defendant's conduct was the cause of plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was severe. *Peytan v. Ellis*, 200 Conn. 243, 253 (1986); *Reed v. Signode Corp.*, 652 F. Supp. 129, 136 (D. Conn. 1986). Liability is imposed "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Collins v. Gulf Corp.*, 605 F. Supp. 1519, 1521 (D. Conn. 1985) (citing Restatement (Second) of Torts § 46, Comment d (1965)).

Whether defendants' conduct was extreme or outrageous under the facts and circumstances of the case "requires determination by the court in the first instance." Id. at 1522.

The legal sufficiency of a claim alleging such conduct is not a question of fact for the jury. *Kintner v. Nidec-torin Corp.*, 662 F. Supp. 112, 114 (D. Conn. 1987). Plaintiff has shown no basis in fact from which outrage or extreme conduct may be inferred. Rather, plaintiff merely states conclusively that publication of the statements constituted "extreme outrage." Amended complaint, ¶ 35, 36.

Plaintiff claims that two categories of statements have caused him injury: (1) that the ultimate size a bodybuilder can achieve is determined in part by genetics, and (2) that large muscle size can be achieved without the use of anabolic steroids. Construing the amended complaint and all supporting materials in the light most favorable to plaintiff, the court concludes that plaintiff has made no showing from which a jury would be permitted to infer that the statements at issue are extreme or outrageous, in light of the commonly accepted meaning of those terms. See Collins, 605 F. Supp. at 1522; Kintner, 662 F. Supp. at 114.

3. Misrepresentation and Deceit (Count III)

In order to recover for fraud or misrepresentation, a plaintiff must demonstrate (1) that a false representation was made as a statement of fact; (2) that the statement was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that plaintiff did act on it to his injury. *Miller v. Appleby*, 183 Conn. 51, 54-55 (1981). Plaintiff can recover only for those injuries proximately caused by the representations complained of. "Those results are proximate which must be presumed to have been within the contemplation of the defendant as the probable consequence of his fraudulent representations." *Kornblau v. McDermant*, 90 Conn. 624, 632 (1916).

In order to constitute fraud, the defendants' statements must have induced plaintiff to take some action because he believed the false statements to be true. Plaintiff alleges that he "continued to train intensely," that he "announced to numerous persons his intention of achieving massive muscle

size," that he set and displayed "specific numerical goals as to measurements and strength," and that he "caused to be made a special motor vehicle license plate which advertised the Plaintiff's bench pressing goal." Amended complaint, ¶ 49. These acts, particularly insofar as they are essentially continuations or extensions of plaintiff's prior activities, cannot reasonably be interpreted as actions taken in detrimental reliance on defendants' statements. Nor are the damages alleged such that might foreseeably be expected to follow from the character of the representations. See Prosser, Torts (4th ed.) § 110, at 732, cited in *Miller*, 183 Conn. at 58.

4. Injurious Falsehood (Count IV)

Plaintiff alleges that falsehoods published by defendants have caused "the general public to view natural bodybuilders in general and the Plaintiff in particular as laughable, ridiculous failures who are unable to reach a respectable bodybuilding goal due to 'genetic limitation,' and to inflict upon natural bodybuilders in general and upon the Plaintiff in particular, insults, ridicule, and verbal harassment." Amended complaint ¶ 54. To state a claim for injurious falsehood, a plaintiff must allege interference with a pecuniary expectancy. *Dale System, Inc. v. Time, Inc.*, 116 F. Supp. 527, 533 (D. Conn. 1953). Although Connecticut law does not require pleading of the loss of specific sales, see id. at 533-34, plaintiff must nevertheless plead pecuniary loss, such as diminution of business or profits, and that "the publication played a material and substantial part in inducing others not to deal with" him. Id. at 533. Plaintiff has not met this requirement.

5. Product Liability: Negligence, Recklessness and Willful and Wanton Actions (Count V)

Plaintiff claims that defendants negligently published false statements. This appears to be a restatement of plaintiff's libel claim, and if so, must fail for the reasons discussed supra, II(B)(1). Nor does this count state a claim for negligent misrepresentation. Justifiable reliance is an ele-

ment of any claim for negligent misrepresentation. *Frimberger v. Anzellotti*, 25 Conn. App. 401 (1991); see supra, II(B)(3).

6. Breach of Warranty (Counts VI & VII)

Plaintiff claims that defendants have breached express and implied warranties by printing statements that large muscle size is possible through persistent training, while in reality, plaintiff alleges, anabolic steroid use is also required. Plaintiff also bases his breach of warranty claims on defendants' printing photos of bodybuilders without revealing the importance of genetic makeup and steroid use.

Connecticut law, incorporating the Uniform Commercial Code, recognizes three types of warranties: express warranties (Conn. Gen. Stat. § 42a-2-313), implied warranties of merchantability (Conn. Gen. Stat. § 42a-2-314), and implied warranties of fitness for a particular purpose (Conn. Gen. Stat. § 42a-2-315). Each of these warranty provisions applies specifically to "goods." The definition of "goods" includes:

> all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid. . . .

Conn. Gen. Stat. § 42a-2-105. This definition is sufficiently broad to include magazines and books; hence, the merchant of magazines and books impliedly warrants their tangible, physical properties. However, courts interpreting the U.C.C. provisions at issue here have distinguished "between the tangible properties of these goods and the thoughts and ideas conveyed thereby." *Cardozo v. True*, 342 So.2d 1053, 1055 (Fla. Dist. Ct. App.), cert. denied, 353 So.2d 674 (Fla. 1977).

Ideas are not equivalent to commercial products; the Uniform Commercial Code did not intend to impose liability without fault upon persons or entities that disseminate ideas. Id. at 1056. The warranty provisions do not extend to material communicated by author or publisher of a book or magazine. Id.; See also *Beasock v. Dioguardi Enterprises, Inc.*, 130 Misc.2d 25, 29, 494 N.Y.S.2d 974, 978 (1985), rev'd on other

grounds, 117 A.D.2d 1015, 499 N.Y.S.2d 560 (4th Dept. 1986). The photograph of a large weightlifter, like the photograph of a female model, does not constitute a warranty by the magazine or its publisher that the purchaser can come to resemble the photograph. Ideas are not products.

7. Strict Product Liability (Count VIII)

The doctrine of strict liability does not extend to words or pictures. *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th cir. 1990). Citing the high priority society places on the unfettered exchange of ideas, courts have refused to extend the concept of liability without fault to words and ideas. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991). The Supreme Court has rejected the imposition of liability without fault on a publisher in a defamation action. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1876).

8. Right of Privacy (Count IX)

Plaintiff alleges violation of his right of privacy. However, he has not alleged an unreasonable intrusion into his private affairs. The "right of privacy is 'the right to be let alone.'" *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 125, 128 (1982). Unreasonable publicity given to another's private life is actionable only if the matter publicized would be "highly offensive to a reasonable person." Id. at 133. Here, the matter publicized is not of a kind that a reasonable person would find highly offensive. Plaintiff has not alleged that defendants have published any statements that refer to him individually or to his private affairs. His allegations that defendants have made general statements about the bodybuilding potential of ectomorphs do not state a claim for invasion of his privacy.

Conclusion

Accordingly, defendants' motions to dismiss (documents #7 and #21) are granted.

Plaintiff's motion for leave to file reply (document #69) is granted nunc pro tunc, as the reply was considered.

Plaintiff's motion for leave to file supplement and for reconsideration (document #64) is granted nunc pro tunc, as the supplement was considered. The order dated 12/3/92 (document #57) is amended so as to incorporate that supplement into the record.

Plaintiff's motion for leave to file affidavit (document #60) is granted nunc pro tunc, as the affidavit was considered.

Defendants' motion for leave to file supplement (document #59) is graned nunc pro tunc, as the supplement was considered.

SO ORDERED.

Dated at New Haven, Connecticut, this 13th day of September, 1993.

/s/ Peter C. Dorsey
Peter C. Dorsey
United States District Judge

JUDGEMENT OF THE DISTRICT COURT
SEPTEMBER 16, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. KOZELKA	)
	)
v.	) CASE NO. 2:92CV00678 (PCD)
	)
JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, I BRUTE ENTERPRISES INCORPORATED, CONTEMPORARY BOOKS INCORPORATED	)

JUDGMENT

This cause having come on for consideration on defendants' motions to dismiss before the Honorable Peter C. Dorsey, United States District Judge, and the issues having been duly considered including applicable principles of law and on September 13, 1993, a Ruling on Motion to Dismiss having been filed granting the motions,

It is ORDERED, ADJUDGED and DECREED that judgement be and is hereby entered in favor of the defendants dismissing this action.

Dated at New Haven, Connecticut, this 16th day of September, 1993.

KEVIN F. ROWE
CLERK, UNITED STATES DISTRICT COURT
BY /s/ Deputy in Charge
DEPUTY IN CHARGE

ARTICLE I OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redness of grievances.

ARTICLE V OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VII OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

SECTION 1 OF ARTICLE XIV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

* * * *

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 34(b) OF THE LOCAL RULES OF THE SECOND CIRCUIT COURT OF APPEALS

Time Allotments. The judge scheduled to preside over the panel will set the time allowed for argument by each party after considering the appellant's brief and each party's request for argument time. Normally, ten or fifteen minutes will be allotted to each side. Parties on the same side of an appeal may be obliged to divide the time allotted to their side. Arguments in pro se appeals are normally five minutes per side. The clerk will notify counsel and pro se parties of all such time allotments.

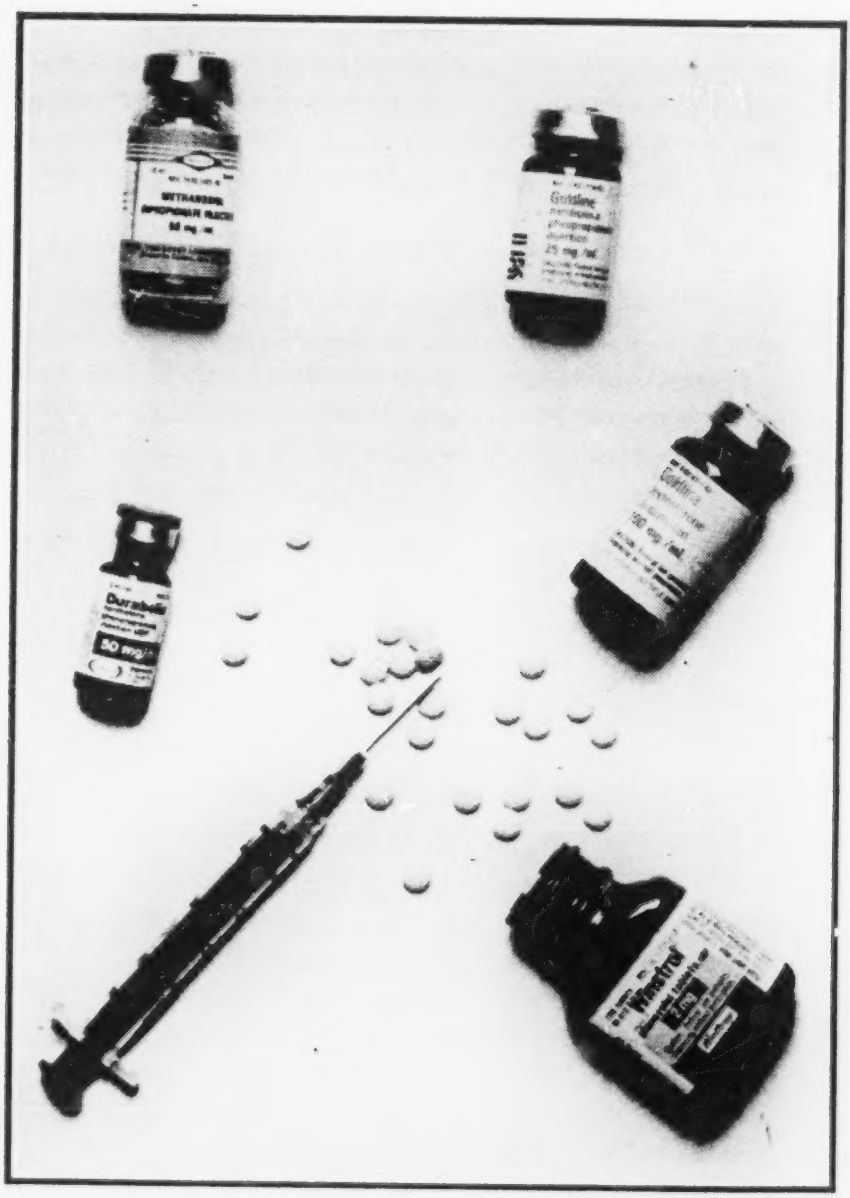
INSTRUCTIONS ISSUED BY THE SECOND CIRCUIT COURT OF APPEALS REVISION OF AUGUST 1993

PRE-ARGUMENT CONFERENCE

In counselled cases (cases in which both parties are represented by attorneys, or where an attorney or law school graduate is proceeding pro se), a pre-argument conference may be scheduled with Staff Counsel of the Court of Appeals. The purpose of the conference is to consider the possibilities of settlement, to simplify the issues, to resolve procedural problems, or to discuss any matters which may aid in the expeditious disposition of the case.

EXCERPT FROM COMPETITIVE BODYBUILDING BY JOE WEIDER, FILED IN DISTRICT COURT AS EXHIBIT A

(Chapter 9, pages 91-95)



(Illustration on page 91)

Bodybuilding Pharmacology

Drugs! To take or not to take, that is one of the most popular questions among all bodybuilders these days. And, an overwhelming percentage of athletes with competitive aspirations have made the choice to take anabolic steroids and other "bodybuilding" drugs. They do so for one reason: bodybuilding drugs allow you to improve your physique more quickly, more easily, and to an ultimately greater degree.

Every drug has a side effect, however, although deleterious side effects can essentially be eliminated through intelligent management of drug use. Still, the rampant use of drugs in bodybuilding has spawned a movement of "natural" competitions in which only drug-free bodybuilders (they must pass a test to establish this fact) are allowed to compete.

Therefore, you do have a choice: you can use bodybuilding drugs in an intelligent manner, or you can enter only natural competitions. There aren't that many natural shows yet, and the movement is experiencing its growing pains (namely many bodybuilders trying to "beat the test") at the present time, but natural shows are growing rapidly in popularity.

I haven't definitively decided whether I'm in favor of drug use, but two things are certain: various drugs do work, and side effects can be minimized if drugs are used wisely and under competent medical supervision.

In the final analysis, you must first weigh the pros and cons of drug use in consultation with your physician, then make the personal decision whether to use bodybuilding drugs. I intend to give you sufficient background information in this chapter to aid your decision.

ANDROGENIC DRUGS

Your body produces a hormone called testosterone, which is responsible for your strength and muscle mass, as well as for such secondary sex characteristics as facial hair, a

deepened voice, and body hair. Testosterone is known as an androgen, and there are a number of drugs on the market that consist of testosterone - testosterone propionate, testosterone enanthate, testosterone cypionate, and aqueous-based testosterone.

Testosterone was available in injectable water-based form during the 1930's, and as such was the first anabolic (tissue-building) drug available to athletes. Many body builders use testosterone drugs today, although foolishly so, because of the many serious side effects of the drugs.

One common myth in bodybuilding is that you have to take testosterone for the really "hard" look to your physique. Rather than making a bodybuilder look harder, however, testosterone gives his body a puffy, soft appearance as a result of great water retention.

Frederick C. Hatfield, Ph.d., an editor for Muscle & Fitness magazine, is a leading authority in the use of anabolic agents in bodybuilding, powerlifting, and athletics in general. Fred reveals, "Testosterone is a drug that bodybuilders should avoid. The more androgenic a drug is, the more it appears to stimulate muscle growth, but this illusory growth is largely a result of water retention and storage of cell protein. There may be an increase in strength in some lifts, although it doesn't come from added contractile ability in muscle cells, but rather from improved tissue leverage.

"Muscle size increase resulting from testosterone usage is only temporary. The only true way to muscle mass increase is to develop very dense muscle cells by increasing their myofibrils (contractile units). And there is considerable empirical evidence that low-androgenic/high-anabolic drugs do this most efficiently, particularly when applied with planned, long-term approach to bodybuilding drug use."

Hazards

One of the most deleterious side effects from testosterone usage is heightened irritability and aggressiveness, and it's not uncommon for some bodybuilders to become screaming maniacs in the gym during the last few weeks before an

important competition. Other harmful side effects form testosterone usage include hair loss, acne, testicular, atrophy, hypertension (high blood pressure), libido change, sperm count change, liver function alteration, and gynecomastia (popularly referred to as "bitch tits," a topic that will be treated in greater detail later in this chapter).

So in the final analysis, testosterone is one of the last bodybuilding drugs that you should try if you decide to use pharmacological means of improving your physique.

ANABOLIC STEROIDS

Anabolic steroids are essentially testosterone with as many of the androgenic properties of the hormone as possible removed. They are essentially artificial male hormones, but with most of the bad side effects of testosterone removed. Still, steroids do have some serious side effects.

The following list provides the nine side effects for men attributed to anabolic steroids taken from Physician's Desk Reference (PDR), the standard encyclopedia of pharmaceuticals used by all physicians:

1. Liver and kidney dysfunction and damage.
2. Possible liver, kidney, and prostate cancer.
3. Testicular atrophy and increased or decreased libido.
4. Premature closure of bone growth plates in pubertal men (which results in a stunting of height).
5. Water retention and consequent hypertension.
6. Acne.
7. Hair loss.
8. Osteoporosis (a weakening of the bone caused by a depletion of bone calcium).
9. Increased aggression.

There is also a warning in the PDR that anabolic steroids do not cause increases in strength or improvement in athletic performance. Obviously, this is hogwash, since thousands of bodybuilders have used steroids to increase muscle

mass and strength for more than the past 25 years.

For bodybuilding purposes, you must understand that steroids have varying anabolic indices. This means that some drugs have greater androgenic properties than others, and it's best for bodybuilders to avoid highly androgenic steroids, such as Anadrol and Dianabol.

As you will recall from our previous discussion of androgenic agents, Dr. Fred Hatfield reveals, "There is considerable empirical evidence that low-androgenic/high-anabolic drugs [increase myofibrils] most efficiently, particularly when applied with a planned, long-term approach to bodybuilding drug use."

Among oral anabolics, Dr. Hatfield considers Anavar to be the least androgenic. Among injectables, the least androgenic are Primobolin, Deca-Durobolin, Winstrol V, and a veterinarian drug called Equipoise that is widely used among champion body builders.

In the past, anabolic steroids have been used in one of two ways. The safe and sane method, advocated by Arnold Schwarzenegger and many other elite bodybuilders, has been to use anabolics in moderate dosages only for the final six to eight weeks prior to a competition. (For the final week, however, steroids are discontinued to reduce the inevitable degree of water retention that they cause.)

Arnold Schwarzenegger (seven times Mr. Olympia) comments, "This is the only sensible method of taking steroids, because large dosages and/or taking steroids for extended periods of time greatly increase the chance of undesirable side effects. Your goal in taking steroids should only be to help maintain some of the muscle mass that you built up in the off-season once you're on a strict precontest diet."

The less sensible classic method of steroid use has been to take the drugs continually on a long-term basis, sometimes for years at a time. And since your body's own testosterone production slowly decreases when you're on steroids, a bodybuilder who follows this plan must use greater and greater amounts of the drugs to produce a positive muscle-building effect.

Bodybuilders who follow this plan seldom come off steroids, because they deflate like balloons when they do. Their bodies are producing so little natural testosterone that they don't maintain the bloated-up muscle mass they produced. So as soon as they begin to shrink in size, they panic and go back on the roids.

As Arnold pointed out, this is a very dangerous practice, because the more steroids you take and the longer you take anabolics, the greater the risk of bad side effects. Most of the horror stories you hear about steroid side effects are told by men who have fallen victim to steady, long-term usage of anabolic steroids.

Steroid Cycling

Dr. Fred Hatfield has come up with a very effective method of cycling steroid use that allows nearly steady long-term use of anabolic steroids in safety. With this method, varying dosages of steroids are taken for six weeks, then a two-week rest period is scheduled, during which HCG injections are taken to stimulate regeneration of natural testosterone production. After a two-week layoff from steroids, another six-week cycle can be initiated.

"I've spent a great deal of time reviewing the research that's been done on anabolic steroids," Fred says. "So, there's no guesswork involved in this cycling system. The entire program hasn't been empirically proven, but each of the bits of research that make up the whole scheme has been substantiated. Let's review the various components of research information that have combined to form the steroid cycling system.

"The first piece of information that you need to have in order to understand this system is that it's a well-known, well-substantiated fact that a decreasing dose pattern of steroid use limits the risk of taking the drugs. This is because the descending dose pattern allows the body to maintain homeostatic equilibrium; there's a minimum disruption of liver function, testosterone production, and so on.

"Second, it's well known that because there's a different molecular structure in oral and injectable steroids, injectables are typically safer and longer lasting. Third, you receive greater muscle-building effects and fewer side effects with low-androgenic/high-anabolic drugs. And, finally, it is well known that long-term usage of anabolics will promote myofibril growth, while the normal short-term six- to eight-week use of steroids does not measurably increase myofibril growth.

"Put all of these factors together, and you come up with the following cyclic steroid dosage scheme that maximizes the benefits and minimizes the risks:

- Two weeks of high anabolic dosage (up to 100 mg per day).
- Two weeks of moderate anabolic dosage (50-60 mg per day).
- Two weeks of low anabolic dosage (15 mg per day).
- Two weeks off steroids, plus HCG (2cc every other day).

"The most beneficial maximum dosage of steroids is one milligram per kilogram of body weight each day. Dosages beyond this amount increase the risk/benefit ratio, and the risks simply outweigh the benefits.

"The HCG use is important. It's abundantly clear that natural testosterone levels are brought up much more quickly when HCG is administered. Without HCG, it would take four to six weeks for testosterone production to normalize after a period to steroid use, versus only two weeks with HCG. And, it should interest you that you will experience no decrease in performance, muscle density, or muscle mass during the two weeks you're off steroids.

"It's important that you take steroids only with medical supervision. I caution you to see a physician and periodically have a blood profile taken during the second or third week of your steroid cycle. This is when blood enzymes are most critically altered and when the most serious negative manifestations of steroid usage will present themselves.

"This cycle can be repeated ad infinitum with great benefit and little risk. This method curtails the need for steroid "stacking" or "shot gunning," and I've never seen anyone on this program get bitch tits. Over a one-year period of time, you will get far better muscle mass and density, plus greater overall strength, than with any other method I know of!"

This steroid cycling method, as well as a great deal of other valuable and factual information on steroid usage, is included in Dr. Fred Hatfield's great book, Anabolic Steroids - What Kind and How Many. You can mail order this highly recommended book directly from Dr. Frederick C. Hatfield, 15343 Vanowen, Suite 235, Van Nuys, CA 91406. The book costs $7.50 postpaid.

BITCH TITS

Gynecomastia ("bitch tits") is becoming a rampant condition in bodybuilding. This condition is manifested by a puffy and feminine appearance around the nipple of a male bodybuilder. It is caused by an "estrogen rebound" after a bodybuilder goes off very heavy usage of steroids and androgenics. Men's bodies do produce estrogen, a female hormone, and when testosterone production has been greatly suppressed by steroid usage, estrogen overwhelms it and causes bitch tits.

Generally speaking, gynecomastia is caused by long-term use of highly androgenic drugs. According to Michael Walczak, M.D., a sports medicine physician from Van Nuys, California, "Bitch Tits are caused most frequently by the combined use of testosterone and HCG. The solution to bitch tits is to off drugs and get your metabolism straightened out by a reputable physician."

* * * *

EXCERPTS FROM FACTS AND COMPARISONS, FILED IN DISTRICT COURT AS EXHIBIT P

(Page 113-114)

facts and
comparisons®
loose-leaf drug information service

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founding editor
ERVIN K. DASTRUP, BS Pharm, DSc

• • • •

STANOZOLOL

Indications:

Hereditary angioedema: Prophylactic use to decrease frequency and severity of attacks.

Administration and Dosage:

Individualize dosage. Initial dosage is 2 mg 3 times a day. After a favorable response is obtained in terms of prevention of edematous attacks, decrease dosage at intervals of 1 to 3 months to a maintenance dosage of 2 mg/day. Some patients may be successfully managed on a 2 mg alternate day schedule. During the dose adjusting phase, closely monitor patient response, particularly if there is a history of airway involvement.

The prophylactic dose to be used prior to dental extraction, or other traumatic or stressful situations, has not been established and may be substantially larger.

Attacks of hereditary angioedema are generally infrequent in childhood, and the risks from stanozolol administration are substantially increased. Therefore, long-term prophylactic therapy is generally not recommended in children; consider the benefits and risks involved. C.I.*

C-III	**Winstrol** (Winthrop Pharm.)	**Tablets:** 2 mg	Lactose. (W 53). Pink, scored. In 100s.	39

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NANDROLONE PHENPROPIONATE

Indications:

Control of metastatic breast cancer in women.

Administration and Dosage:

Inject deeply IM, preferably into the gluteal muscle.

If possible, therapy should be intermittent. Duration of therapy depends on patient response and adverse reactions.

Adults: 50 to 100 mg weekly, based on therapeutic response.

				C.I.*
C-III	**Nandrolone Phenpropionate** (Various, eg, Lyphomed, Major)	Injection (In Oil): 25 mg per ml	In 5 ml vials.	71+
C-III	**Durabolin** (Organon)		In 5 ml vials.[1]	231
C-III	**Nandrobolic** (Forest)		In 5 ml vials.[1]	83
C-III	**Nandrolone Phenpropionate** (Various, eg, Keene, Major, Rugby)	Injection (In Oil): 50 mg per ml	In 2 ml vials.	78+
C-III	**Durabolin** (Organon)		In 2 ml vials.[1]	251
C-III	**Hybolin Improved** (Hyrek)		In 2 ml vials.[1]	93

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EXCERPT FROM HARDCORE BODYBUILDING BY ROBERT KENNEDY, FILED IN DISTRICT COURT AS EXHIBIT b

(Chapter 10, pages 43-45)

Drugs-
The Illusory "Edge"

> "It appears that anabolic steroids can accelerate the acquisition of muscular strength and power and simultaneously permit training at or near maximum capacity with greater frequency."

That quote from Dr. John P. O'Shea of Oregon University was published by the American Association for the Advancement of Science some twenty years ago, and along with thousands of other pro-steroid quotations, is at least partly responsible for the state many of our bodybuilders are in today.

Artificial steroids do aid in muscle growth and strength, especially in those who train hard and ingest plenty of protein foods. There is just one little catch. They will put you on a dialysis machine faster than it takes you win the Mr. Novice, let alone the Mr. America, title. A dialysis machine does the work of malfunctioning kidneys. The treatment can last all day and one has to have the treatment twice a week - for life.

Artificial anabolic steroids were invented in 1938. They were produced to aid war victims, fire casualties and the aged (especially after illness or operations) to gain strength and weight. The fact that steroids had undesirable side effects didn't seem to matter at that time because they were being administered to those already hanging onto life by a thread.

The IFBB (International Federation of Bodybuilders) does not endorse doping or the taking of artificial growth hormones (androgens).

Nor does the International Olympic Committee (IOC). In May, 1967, their medical committee reported to the IOC's 67th Session in Teheran:

"The IOC considers that the use of anabolic steroids (except for medical purposes) constitutes doping from the Olympic viewpoint." Subsequently the IOC banned steroid use and introduced stringent steroid tests.

Today in Britain, Canada and the U.S.A. a few bodybuilding shows include steroid tests. These are called natural bodybuilding contests because all who take part are free from artificial anabolic steroids. Surely they are the wave of the future. But the problem exists on a huge scale. Not only do professional bodybuilders take steroids to help them win contests, but even school kids and novice bodybuilders take them...and take them...and take them. * * * *

Virtually every city in North America has a gym which distributes anabolic steroids. Often the gym owner has a drawer full of hypodermic needles, and will refer to the treatment as "your B12 shots."

Of course in some cases a gym member may legitimately be getting B12 shots, but more often than you'd expect, the substance is artificial anabolic steroid. The gym owner may attempt to cover himself by having a local doctor write the prescription and even administer the drug. But where in the Hippocratic oath does a doctor get the right to administer drugs to sportsmen in perfect health?

If a gym owner ever offers you artificial steroids, go to your local medical association and register an official complaint. Tell the Better Business Bureau about him, and make the gym owner pay back your entire fee. Then go to the local chamber of commerce and make them act against the offender. The sooner he is put out of commission the better. Too many innocent youngsters have been taken advantage of this way: While they suffer the problems caused by the drugs, the creeps who sell them are laughing all the way to the bank.

According to national bodybuilding champion Rod Koontz, some misguided bodybuilders who take steroids to gain weight are also taking thyroid to cut up (get definition), speed to train hard, weed to come back down to get some sleep, Ritalin® to make it easier to diet, Thyomucase® to thin the skin, and Quaaludes® so they don't feel the pain of training.

Misguided they most definitely are, because these drugs will sooner or later knock out even the ruggedest bodybuilder. Steroids are hormones. They contribute to a constructive metabolic process that turns food into living tissue. They can also be hepatic (affect one's liver); carcinogenic (contribute to cancer); responsible for "undue edema" (give one dropsy), and can promote coronary thrombosis (heart attack).

In his book Anabolic Steroids and Sports (Sports Science Consultants, Natick, Massachusetts, 1978), Dr. James E. Wright, without condoning the use of steroids, tries to get laymen to understand why an athlete may take steroids. He quotes a world-class athlete whom he interviewed:

"Think about how small the differences usually are between first and second place, between winning and losing (in high level competition). And keep in mind the drive and ambition and the competitive spirit of somebody competing at that level. Think about the time, the energy, and the pain invested...The financial rewards are, in most cases, minimal...I hate to admit it, but an obsessive-compulsive personality is practically a requirement (for success at these levels)...The advice I value most is from people who've been there...The average guy on the street, and even lots of people in sports obviously don't understand the pressures...It's like everything else in life: when it all gets down to the nitty-gritty, you grab anything you can that might give you a winning edge."

It is true, however, that bodybuilders do not like taking steroids. But because their competition is taking them and gaining an edge, they believe that they too must join the pack or be left behind. One top professional bodybuilder who wished to remain anonymous told me: "There are twenty-five different types of anabolic steroids in existence today and some are safer to take than others.

"I usually benefit from taking steroids while training for a top pro contest, I find I gain the most benefit from these drugs when I'm dieting very hard. The main advantage for me is that they retain the size in the muscles while I'm burning away body fat. But, of course, I have to have the correct amount of protein balance in my body or the steroids will not work."

Curiously, because most bodybuilders shave their bodies before a competition or a photo session, the uninitiated layman, sensing something "abnormal" (a plucked turkey appearance?), has often accused the bodybuilder of having "synthetic-looking" muscles.

With the wide use of steroids, the bodybuilder at last gives weight to the layman's original argument which for years had no truth, but now alas, stings with the sorry reality that at least a percentage of most top bodybuilders' muscles is the result of a pill or a hypodermic needle.

The strong movement to rid bodybuilding and other sports of anabolic steroids gained impetus when the International Federation of Bodybuilders, as a service to the International Sports Federation, presented a report based on research conducted by James E. Wright, Ph.D. entitled Anabolic-Androgenic Steroids in Sport." The report dealt in depth with the entire question, especially from the bodybuilders' point of view, and resoundingly concluded that no title or sports achievement is worth risking one's mental and physical health.

IFBB head Ben Weider also has personally known individuals who have seriously harmed their health and physique as the result of heavy steroid consumption. In a couple of cases the fellows were teenagers who cried when their doctors related the seriousness of the damage and, too late, they wondered why they had been do incredibly stupid! * * * *

It is no exaggeration to say that shortsighted bodybuilders who have taken "therapeutic" doses of steroids and other chemicals have permanently damaged their health, and in numerous cases, have brought about untimely death.

As much as anyone I appreciate the pressing need of the aspiring bodybuilder for fast muscular development. He wants the ultimate in size and muscularity, and will do almost anything to attain his goal. My advice is: Do almost anything, but stop short of the total lunacy of drug abuse.

EXCERPT FROM JANUARY 1993 ISSUE OF MUSCLE AND FITNESS MAGAZINE, FILED IN COURT OF APPEALS AS EXHIBIT e

Synthetic Heroes
By Joe Weider,
Trainer of Champions Since 1936

* * * *

Despite the ban on bodybuilding drugs today, a great number of Americans, many of them adolescents, use black-market steroids. A recent U.S. News & World Report investigation found that half the teenagers who use steroids start before the age of 16, and some of them began as early as 10. Some of the kids want to be sports champions, but over a third of them aren't even on a high school team. Over half the teen users say they were motivated by the photos of the physiques in the muscle magazines, while the others were influenced by famous athletes who, they were convinced, took steroids.

The risks to young users are considerable. The massive doses often taken by young users whose bodies and brains are still developing can have lasting effects, one of the worst being stunted growth since steroids can cause bone growth plates to seal. The typical shrinking that occurs between drug-taking phases is so abhorrent to those obsessed with size that they resort to even larger doses than before. Faced with this psychological dependency when they try to stop, they may fall into a deep depression that may turn them to narcotics for relief. Under the steroid influence, they become irritable and pugnacious. Sometimes steroid users end up behind bars for antisocial assaults.

More research needs to be done, but physicians are concerned about the reports of liver and kidney problems, and the occasional death at a young age from heart attacks and strokes. It seems the young users are not fazed by the threats, either because the medical community has failed to come up with enough documented evidence or because in their youth-

ful naiveté they feel invulnerable. It has almost gotten to the point where the teenagers see the substances as another training aid. They want to be big and strong at any cost.

Steroids are illegal. Drug enforcement agents estimate that up to 50% of the blackmarket drugs are ersatz, perhaps a saline solution or even penicillin (which can be deadly to some). One popular substance, GHB, which releases human growth hormone, can lead to coma and death.

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AFFIDAVIT OF FRANK GANCARZ FILED IN DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. KOZELKA : CIVIL ACTION
Plaintiff

VS : NO. 292CV00678 (PCD)

JOSEPH WEIDER ET AL : MAY 14, 1993
Defendants

AFFIDAVIT OF FRANK GANCARZ SUPPORTING PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENT AND OPPOSING DEFENDANTS' MOTION TO DISMISS

I, Frank R. Gancarz of 172 House Street, Glastonbury, Connecticut, being duly deposed, do hereby aver and attest to the truth of the following:

1. Since the year 1958, I have been involved in weight lifting, powerlifting and bodybuilding, both as an active participant in the sports and as trainer, instructor, coach and licensed contest official.

2. As an active participant in the sports of weight lifting and powerlifting, I achieved the following officially recorded poundages in competition lifts:

a. Bench Press - 500 pounds.
b. Squat - 600 pounds.
c. Dead Lift - 600 pounds.
d. Standing Press - 350 pounds.
e. Clean and Jerk - 370 pounds.
f. Snatch - 270 pounds.

3. In the year 1959, I won the Teenage Mr. Connecti-

cut title in bodybuilding, and also the state teenage weight lifting championship and award for outstanding lifter of the competition.

4. In the year 1972, I won the New England championship in weight lifting and powerlifting.

5. From the year 1963 to the present date, I have been President of the Connecticut Association of the Amateur Athletic Union and of the United States Weight Lifting Federation.

6. Between the years 1983 and 1989, I was National Junior Olympics chairman for the Amateur Athletic Union in the sport of weight lifting.

7. From the year 1974 to the present date, I have been a licensed national weight lifting and powerlifting referee.

8. Between the late 1960's and the early 1980's, I have judged many times at the Mountain Park physique contests promoted by Edward Jubinville of Holyoke, Massachusetts, a world-renowned bodybuilding official who has judged at a number of Mr. Olympia competitions and who was featured on page 30 of the April 1993 issue of Flex magazine.

9. I was chief official at all local Connecticut Amateur Athletic Union physique contests during the 1960's, 1970's and 1980's.

10. I promoted the 1976 teenage Mr. America contest, as well as a Collegiate Mr. America competition and many local physique contests.

11. From the year 1968 to the present date, I have been weight lifting coach of the Connecticut Weight Lifters' Club, which won a national championship at the American Championships during the 1980's.

12. Between the years 1968 and 1988, I was a volun-

teer weight lifting instructor at the Young Mens' Christian Association (YMCA) of Willimantic, Connecticut.

13. Throughout the years of my coaching, I have attended many seminars on the subject of anabolic steroid abuse in sports.

14. Based on all of my experience, knowledge, observations, reading, study, research and consultation with other experts in the fields of weight lifting, powerlifting and bodybuilding, I hold the following statements to be true in my expert opinion:

a. The assertion that each muscle cell contains within its chromosomes coded instructions which dictate the maximum size which the cell can grow to in response to training, as alleged by Mike Mentzer on page 180 of the July 1993 issue of Flex magazine, is an unproven speculation which is impossible to test by any scientific experiment.

b. The assertion that the total number of muscle fibers contained in any given muscle is predetermined by genetics and cannot be changed by training, as alleged by Mike Mentzer on page 180 of the July 1993 issue of Flex magazine, is an unproven speculation which contradicts the known scientific fact that muscle fibers in animals have been induced to divide in half and increase in number in response to muscular exertion.

c. The assertion that individuals of small bone structure will never be able to achieve massive muscle size, as alleged by Mike Mentzer on page 179 of the July 1993 issue of Flex magazine, is a falsehood contradicted by known examples of men with small bone structure who have achieved massive muscle size.

d. The argument given by Mike Mentser on page 179 of the July 1993 issue of Flex magazine in support of the assertion set forth in section c of paragraph 14 above, involving

the circumference, density and strength of bones, is scientifically and logically unsound and invalid.

e. The assertion that only a very small percentage of men will have the requisite genetic traits to become champions, as alleged by Mike Mentzer on page 179 of the July 1993 issue of Flex magazine, is extremely speculative and unsupported by any facts or scientific evidence.

f. The statements at issue in the foregoing legal action as described in section a of paragraph 6 and set forth in paragraph 7 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, are falsehoods contradicted by known examples of men of small bone structure or ectomorphic body type who have achieved massive muscle size.

g. The statements at issue in the foregoing legal action as described in section b of paragraph 6 and set forth in paragraphs 7 and 7.2 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, constitute unproven speculation which is impossible to test by any scientific experiment.

h. The statement at issue in the foregoing legal action as described in section c of paragraph 6 and set forth in section g of paragraph 7 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, is a falsehood contradicted by the known fact that negative results may be due to improper training methods.

i. The statements at issue in the foregoing legal action asserting that men of small bone structure or ectomorphic body type will never achieve certain specified levels of competitive success in bodybuilding, are falsehoods contradicted by known examples of such men who have achieved the highest levels of competitive success.

j. The statements at issue in the foregoing legal ac-

tion asserting that the degree of competitive success in bodybuilding which a person can ever hope to achieve is predetermined by genetics, constitute unproven speculation which is impossible to test by any scientific experiment.

k. The statements at issue in the foregoing legal action as described in sections f, h and i of paragraph 6 and set forth in sections g, k and p of paragraph 7 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, are grossly defamatory of men who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult.

l. The statements at issue in the foregoing legal action published by the Defendants concerning the alleged limitations of men of certain genetic or body types, are devastating to the self-respect and mental health of men who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult.

m. The statements at issue in the foregoing legal action published by the Defendants concerning the alleged limitations of men of certain genetic or body types, are devastating to the reputation and public image of men who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult.

n. The printing of statements of the type at issue in the foregoing legal action concerning the alleged limitations of men or certain genetic or body types, constitutes a breach of the duty and responsibility of members of the profession of bodybuilding authorities, to exercise reasonable care to provide truthful and helpful instruction and to avoid inflicting mental harm on those who purchase and read their printed material and who rely upon their printed instructions.

o. The printing of statements of the type at issue in the foregoing legal action concerning the alleged limitations of men of certain genetic or body types, constitutes conduct

which exceeds the limits normally viewed as acceptable by society and which a person of normal sensibilities would label as outrageous.

p. The continued printing of statements on genetic limitation, of the type at issue in the foregoing legal action, by the Defendants, after having received numerous letters from the Plaintiff informing them that such statements were false, defamatory and injurious, would constitute conduct which exceeds the limits normally viewed as acceptable by society and which a person of normal sensibilities would label as outrageous.

q. The position of great renown and authority held by Joe Weider in the eyes of the general public gives him a unique power and ability to harm readers mentally and emotionally by any statements printed within publications bearing his name.

r. The action of Joe Weider in publishing, causing to be published, allowing to be published or endorsing, printed material containing statements on genetic limitation of the type at issue in the foregoing legal action, constitutes an abuse of the position of renown, authority and influence which he holds with respect to his readers, and exceeds the limits of conduct normally viewed as acceptable by society.

s. The action of Joe Weider in publishing, causing to be published, allowing to be published or endorsing, printed material containing statements on genetic limitation of the type at issue in the foregoing legal action, constitutes a breach of the duty and responsibility of members of the profession of bodybuilding authorities, to exercise reasonable care to provide truthful and helpful instruction for and to avoid inflicting mental harm on those who purchase and read their printed material and who rely upon their printed instructions.

t. The action of the Defendants in publishing statements of the type described and set forth in paragraphs 6 and 7 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, while publishing articles of the type described and set forth in paragraphs 38 and 39 of the Plaintiff's Amended and Supplemented Complaint, is harmful and injurious to readers who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult, having the effect of jerking a person's mind back and forth between two contradictory beliefs concerning his ability and potential.

u. The action of the Defendants in publishing statements of the type described and set forth in paragraphs 6 and 7 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, while publishing articles of the type described and set forth in paragraphs 38 and 39 of the Plaintiff's Amended and Supplemented Complaint, constitutes a breach of the duty and responsibility of members of the profession of bodybuilding authorities, to exercise reasonable care to provide truthful and helpful instruction for and to avoid inflicting mental harm on those who purchase and read their printed material and who rely upon their printed instructions.

v. The action of the Defendants in publishing statements of the type described and set forth in paragraphs 6 and 7 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, while publishing articles of the type described and set forth in paragraphs 38 and 39 of the Plaintiff's Amended and Supplemented Complaint, constitutes conduct which exceeds the limits normally viewed as acceptable by society and which a person of normal sensibilities would label as outrageous.

w. The muscle size and development portrayed within the magazines and books at issue in the foregoing legal action is attainable only when proper training and diet, dedication, persistence, will power and motivation are supplemented by anabolic steroid use.

x. The articles and statements described and set forth in paragraphs 45 and 46 of the Plaintiff's Amended and Supplemented Complaint dated December 14, 1992, including the statements concerning steroid use made by Mike Mentzer on page 170 of the July 1993 issue of Flex magazine, together with the omissions described in paragraph 47 of the Plaintiff's Amended and Supplemented Complaint, constitute intentional fraud and deception.

y. The fraud and deception described in section x of paragraph 14 above, as practiced by the Defendants, would be harmful and injurious to the self-respect, self-confidence and mental and emotional well-being of any natural bodybuilder who believed and relied upon the misrepresentation.

z. The fraud and deception described in section x of paragraph 14 above, as practiced by the Defendants, is harmful and injurious to the reputation and public image of natural bodybuilders, making them appear foolish in the eyes of those who believe the misrepresentation.

a1. The fraud and deception described in section x of paragraph 14 above, as practiced by the Defendants, would be especially harmful and injurious to the self-respect, self-confidence and mental and emotional well-being of any natural bodybuilder who was ectomorphic or otherwise of a genetic or body type which made progress in bodybuilding difficult, and who believed and relied upon the misrepresentation.

b1. The fraud and deception described in section x of paragraph 14 above, as practiced by the Defendants, is especially harmful to the reputation and public image of natural bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult, making them appear especially foolish in the eyes of those who believe the misrepresentation.

c1. The fraud and deception described in section x of paragraph 14 above, constitutes a breach of the duty and responsibility of members of the profession of bodybuilding authorities, to exercise reasonable care to provide truthful and helpful instruction for and to avoid inflicting mental harm on those who purchase and read their printed material and who rely upon their printed instructions.

d1. The fraud and deception described in section x of paragraph 14 above, exceeds the limits of conduct normally viewed as acceptable by society and would be labelled as outrageous by a person of normal sensibilities.

e1. The position of great renown and authority held by Joe Weider in the eyes of the general public gives him a unique power and ability to harm readers mentally and emotionally and to injure the reputation and public image of people by perpetrating the fraud and deception described in section x of paragraph 14 above.

f1. The action of Joe Weider in publishing, causing to be published, allowing to be published or endorsing printed material perpetrating the fraud and deception described in section x of paragraph 14 above, constitutes an abuse of the position of renown, authority and influence which he holds with respect to his readers, and exceeds the limits of conduct normally viewed as acceptable by society.

g1. The fraud and deception described in section x of paragraph 14 above, and the statements on genetic limitation at issue in the foregoing legal action, will reinforce each other in harming and injuring the self-respect, self-confidence and mental and emotional well-being of natural bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult.

h1. The fraud and deception described in section x of paragraph 14 above, and the statements on genetic limitation at issue in the foregoing legal action, will reinforce each

other in harming and injuring the reputation and public image of natural bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult.

/s/ Frank R. Gancarz
Frank R. Gancarz

STATE OF CONNECTICUT :
: ss. GLASTONBURY
May 14, 1993
COUNTY OF HARTFORD :

On this 14th day of May, 1993, before me, the undersigned officer, personally appeared FRANK R. GANCARZ, known to me to be the person whose name is subscribed to the within instrument, and swore to the truth of all statements contained therein.

In Witness Whereof, I hereunto set my hand and official seal.

/s/ Notary Public
Notary Public

STATEMENT OF FACTS FROM PETITIONER'S BRIEF FILED IN COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN J. KOZELKA Plaintiff-Appellant	:	
VS	:	
	:	USCA NO. 93-9066
JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, I BRUTE ENTERPRISES INCORPORATED, CONTEMPORARY BOOKS INCORPORATED Defendants-Appellees	:	

BRIEF OF PLAINTIFF-APPELLANT

* * * *

STATEMENT OF FACTS

1. From times prior to April of 1983 through July of 1993, the Defendants have continued to publish within the magazines and books at issue, numerous statements humiliating and ridiculing men who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult, disparaging their potential to ever achieve large muscle size. (Appx. 120-127A, ¶¶6-7, 7.1, 7.2; 169A-171A, ¶¶83-84; 209A, 211A-212A; 74A)

2. The Plaintiff is naturally of very thin ectomorphic body type. (Appx. 128A, ¶¶13, 15a)

3. From times prior to April of 1983 through July of 1993, the Defendants have continued to publish within the magazines and books at issue, numerous pictures of bodybuilders depicting enormous muscle size, descriptions of tremendous strength levels possessed by the bodybuilders pictured, and training programs alleged to have been used by the bodybuilders portrayed to produce the tremendous size and strength levels depicted. (Appx. 145A-146A, ¶¶64, 67; 84A, 154A, 176A, 182A-183A; 48A, 53A; 90A, 95A-98A; 38A, 41A, 197A; 205A-207A, 209A-210A, 212A-214A)

4. From times prior to April of 1983 through July of 1993, the Defendants have continued to publish within the magazines and books at issue, numerous statements and articles which assert or imply that the muscle size and strength levels depicted within the publications at issue were attained, can be attained and should be attained by natural means without anabolic steroids. (Appx. 137A-140A, ¶¶45-46; 171A-172A, ¶¶87-88; 214A)

5. The Defendants have omitted from the magazines and books at issue, except from the book Competitive Bodybuilding, any statements indicating that the muscle size and strength levels portrayed within the publications are dependent upon anabolic steroid use. (Appx. 140A-141A; ¶47)

6. From times prior to April of 1983 through July of 1993, the Defendants have published numerous statements and articles which contradict and refute the statements described in ¶1 directly above. (Appx. 134A-136A, ¶¶38-39)

7. The Defendants have published within the books Competitive Bodybuilding, The Weider System of Bodybuilding and Bodybuilding: The Weider Approach, affirmations and promises asserting that the magazines and books at issue contain all of the information necessary to enable the reader to attain the muscle size and development portrayed within the publications. (Appx. 140A-141A, ¶47; 89A; 53A; 96A-97A)

8. Between the dates of May 2, 1981 and May 30, 1992, the Plaintiff mailed to Defendant Joseph Weider and to various other staff members of Defendants Muscle and Fitness magazine and Flex magazine, numerous letters informing the Defendants of the falsehood of the statements described in ¶1 directly above, and of the injury and harm which such statements were inflicting upon the Plaintiff and other men of the Plaintiff's body type and upon their public image. (Appx. 129A-130A, ¶¶18-21; 19A-20A, 22A, 24A, 26A, 28A-32A, 34A)

9. The letters referred to in ¶8 directly above were received and read by the Defendants. (Appx. 129A, ¶16; 136A, ¶39cl; 21A, 23A, 25A, 27A, 33A, 35A-36A; 37A)

10. Despite the letters received from the Plaintiff as described and referred to in ¶¶8 and 9 directly above, the Defendants continued to publish statements of the type described in ¶1 directly above. (Appx. 120A-127A, ¶¶6-7, 7.1, 7.2; 60A; 169A-171A, ¶¶83-84; 19A-20A, 22A, 24A, 26A, 28A-32A, 34A)

11. The representations described in ¶¶3-5 directly above induced the Plaintiff,

a. To believe that massive muscle size can be achieved naturally,

b. To continue training intensely, motivated by the belief that he could achieve massive muscle size by natural methods, and,

c. To advertise his intention of achieving massive muscle size by oral statements and other representations. (Appx. 141A-142A, ¶49)

12. The representations described in ¶6 directly above induced the Plaintiff to continue purchasing and reading the magazines and books at issue. (Appx. 136A, ¶40)

13. The Plaintiff failed to achieve the large muscle size which he desired. (Appx. 128A, ¶¶14, 15b)

14. As a result of the statements published by the Defendants as described in ¶1 directly above, and of the Plaintiff's reliance upon the Defendants' representations as described in ¶¶11-12 directly above, the Plaintiff suffered great mental and emotional anguish and distress, humiliation, embarrassment, destruction of self-respect, the infliction of insults and ridicule and damage to his reputation and public image. (Appx. 128A, ¶¶11-12; 131A-132A, ¶28; 142A, ¶50; 172A, ¶91; 15A-18A; 82A-83A)

15. The Plaintiff's wife, upon reading the statements at issue described in ¶1 directly above, believed the statements, held the statements to apply directly to the Plaintiff and verbally disparaged the Plaintiff's potential for achieving large muscle size. (Appx. 82A)

16. The mental and emotional injuries sustained by the Plaintiff as described in ¶14 directly above have required the Plaintiff to undergo professional treatment and therapy. (Appx. 131A-132A, ¶28a; 16A, ¶5; 17A-18A, ¶4)

17. The Plaintiff's exposure to the statements described in ¶1 directly above have caused the Plaintiff to undergo emergency professional treatment. (Appx. 16A, ¶5; 17A-18A, ¶4)

18. The mental and emotional harm sustained by the Plaintiff as described in ¶14 directly above caused the Plaintiff to suffer the following consequential injuries:

a. The loss of a marriage.

b. The loss of child visitation rights.

c. The infliction of physical training injuries. (Appx. 131A-132A, ¶¶28b, 28c, 28g; 15A-16A, ¶¶2-6; 17A-18A, ¶¶2-5)

19. The Defendants have continued to publish the statements and representations described in ¶¶1, 4-5, and 7 directly above, with full cognizance of the harmfulness of such statements and representations as evidenced by the plead-

ings and other materials filed in the foregoing legal action. (Appx. 126A-127A, ¶¶7.1, 7.2; 60A; 169-172A, ¶¶83-84, 87-88; 74A; 209A, 211A-212A, 214A)

20. The statements described in ¶1 directly above are either known falsehoods or unprovable speculations. (Appx. 134A-136A, ¶¶38-39; 188A-190A, ¶¶14a-14j; 167A, ¶8) [**See Also App.Pet. 37A-38A, ¶¶14a-14j.**]

21. The massive muscle size and enormous strength levels portrayed within the magazines and books at issue are attainable only through the use of anabolic steroids. (Appx. 193A, ¶14w; 167A, ¶7; 158A-159A, ¶¶1, 3) [**See Also App.Pet. 41A, ¶14w; 18A, ¶¶1-3.**]

22. The statements described in ¶1 directly above are injurious to the mental and emotional health of bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult. (Appx. 190A, ¶14l; 192A, ¶14t; 195A-196A, ¶14gl; 167A-168A, ¶9) [**See Also App.Pet. 39A, ¶14l; 43A, ¶14gl.**]

23. The statements described in ¶1 directly above are injurious to the reputation and public image of bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult. (Appx. 190A-191A, ¶¶14k, 14m; 196A, ¶14hl; 167A-168A, ¶9; 82A) [**See Also App.Pet. 39A, ¶14m; 43A, ¶14hl.**]

24. The representations related to steroid use described in ¶¶3-5 and 7 directly above, are injurious to the mental and emotional health of natural bodybuilders, and especially so regarding bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult. (Appx. 194A, ¶¶14y, 14al; 195A-196A, ¶14gl) [**See Also App.Pet. 42A, ¶¶14y, 14al; 43A, ¶14gl.**]

25. The representations related to steroid use, described in ¶¶3-5 and 7 directly above, are injurious to the

reputation and public image of natural bodybuilders, and especially so regarding bodybuilders who are ectomorphic or otherwise of a genetic or body type which makes progress in bodybuilding difficult. (Appx. 194A, ¶¶14z, 14bl; 196A, ¶14hl) **[See Also App.Pet. 42A, ¶¶14z, 14bl; 43A, ¶14hl.]**

26. The Defendants have stated within the book Competitive Bodybuilding, that anabolic steroid use is a normal part of competitive level bodybuilding and is necessary to achieve the muscle size required to compete in most contests. (Appx. 158A, ¶¶1, 3; 159A, ¶1) **[See Also App.Pet. 18A, ¶¶1-3; 21A, ¶¶4-5.]**

27. The Defendants have stated within the book Competitive Bodybuilding, that the great majority of bodybuilders use anabolic steroids. (Appx. 158A, ¶1) **[See Also App.Pet. 18A, ¶1; 21A, ¶4.]**

28. The Defendants have, within the book Competitive Bodybuilding, outlined a program of steroid use for achieving competitive muscle size, wherein the Defendants advocate daily steroid dosages between seven (7) and sixteen (16) times the maximum daily dosage recommended by a pharmaceutical manual. (See ¶5 on page 94 of Competitive Bodybuilding [Appx. 161A; **App.Pet. 23A, ¶2**]. Compare steroid dosage of 100 milligrams per day [700 milligrams per week] recommended in steroid program outlined on page 94 of Competitive Bodybuilding with maximum recommended dosages of anabolic steroids Winstrol [Stanozolol - 6 milligrams per day] and Durabolin [Nandrolone Phenpropionate - 100 milligrams per week] given on pages 113 and 114 of pharmaceutical manual Facts and Comparisons [Appx. 56A-57A; **App.Pet. 26A-27A**]. Note illustrations of drugs Winstrol and Durabolin on page 91 of Completive Bodybuilding [Appx. 158A; **App.Pet. 17A**].)

29. The Defendants assert or imply within the book Competitive Bodybuilding, that the drug program described in ¶28 directly above can be repeated indefinitely without

causing the user any harm. (Appx. 161A, ¶9) **[See Also App.Pet. 22A, ¶3; 24A, ¶1.]**

30. The Defendants assert, within the book Competitive Bodybuilding, that legions of young bodybuilders strive to look like their favorite bodybuilder. (Appx. 183A, ¶1)

31. Legions of bodybuilders of various ages, including school children, suffer grave bodily damage due to anabolic steroid use. (Appx. 99A, ¶¶2, 7; 100A, ¶12; 101A, ¶4) **[See Also App.Pet. 33A, ¶¶1-3; 28A, ¶2; 29A, ¶¶4, 7; 30A, ¶2; 31A, ¶¶5-6.]**

32. Nearly every city in the United States has at least one gym which sells illegal anabolic steroids. (Appx. 99A, ¶8) **[See Also App.Pet. 29A, ¶5.]**

33. The Defendants, within the book Competitive Bodybuilding, attribute to Arnold Schwarzenegger statements advocating and giving instruction in the use of anabolic steroids. (Appx. 160A, ¶¶6-7) **[See Also App.Pet. 21A, ¶¶4-5.]**

34. The Defendants have published pictures and other descriptive representations of the massive muscle size of Arnold Schwarzenegger. (Appx. 70A)

35. The Plaintiff has personally witnessed a bodybuilder using a copy of the book Competitive Bodybuilding and taking anabolic steroids in compliance with the steroid instruction guide published within the book. (Appx. 14A, ¶5)

36. The United States District Court for the District of Connecticut holds personal jurisdiction over Defendant Joseph Weider. [See sections II(A)(1) and II(A)(2) of Ruling on Motion to Dimiss (Appx. 217A-219A; **App.Pet. 5A, ¶¶1-2).]**

37. Defendant Joseph Weider does, transacts and solicits business within the State of Connecticut. [See sections II(A)(1) and II(A)(2) of Ruling on Motion to Dismiss (Appx. 217A-219A; **App.Pet. 4A, ¶2; 6A, ¶1**).]

* * * *

Dated this 9th day of December, 1993, at East Hartford Connecticut.

The Plaintiff-Appellant
/s/ John J. Kozelka
John J. Kozelka
276 Route 87, P.O. Box 84
Columbia, CT 06237
Tel. (203) 228-3539

28 UNITED STATES CODE SECTION 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists.....

* * * *

28 UNITED STATES CODE SECTION 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party.....

* * * *

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

No. 94-321

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

JOHN J. KOZELKA

Petitioner

v.

JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, "I, BRUTE" ENTERPRISES, INCORPORATED, CONTEMPORARY BOOKS, INCORPORATED

Respondents

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, John J. Kozelka ("Petitioner"), acting *pro se*, filed his initial Complaint herein on August 10, 1992, against Respondent Joseph Weider in the United States District Court for the District of Connecticut. Petitioner filed an Amended Complaint on September 3, 1992, adding Respondents *Muscle and Fitness* Magazine, *Flex* Magazine, "I, Brute" Enterprises, Inc., and Contemporary Books, Inc. (hereinafter with Respondent Joseph Weider referred to as "Respondents") as parties.[1]

[1] In accordance with Rule 29.1, Respondents state that the parent company of Contemporary Books, Inc. is the Tribune Company. Weider Health and Fitness, a Nevada corporation, is owned by MLE Holdings, Ltd., a privately owned investment holding company incorporated in Canada. "I,

R-11 through R-54.[2] Petitioner alleged that he was injured by statements and representations contained in the magazines *Muscle and Fitness* and *Flex*, and in several books authored by Mr. Weider.

Respondents moved to dismiss the Amended Complaint. Before that motion could be decided, however, Petitioner filed several motions to amend and supplement his Amended Complaint. Petitioner's motions were granted by the District Court. R-55, R-56. Respondents moved to dismiss the Amended Supplemented Complaint, and their motion was granted. R-118. Petitioner appealed the District Court's decision, and the decision was affirmed by the Second Circuit Court of Appeals.

In his Amended and Supplemented Complaint, Petitioner alleged that he was a bodybuilder with an ectomorphic body type, and that statements contained in Respondents' publications to the effect that the ultimate muscle size which a bodybuilder can achieve is determined in part by genetics have ridiculed and belittled the masculinity of ectomorphic men. Petitioner alleged that these statements constituted libel, intentional infliction of emotional distress, negligence or recklessness, and invasion of his right of privacy. R-66, R-70, R-71.

Petitioner also alleged that Respondents were liable under the theories of fraud and misrepresentation, injurious falsehood, breaches of express and implied warranties, and strict liability. Petitioner asserted that Respondents' publications implied that bodybuilders could achieve large muscle size through the use of

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Brute" Enterprises Incorporated, a California corporation, is owned by Weider Publications, Inc., which, in turn, is owned by Weider Health and Fitness. *Muscle & Fitness* Magazine and *Flex* Magazine are not legal entities but are monthly periodicals published by "I, Brute" Enterprises Incorporated. Defendant Joseph Weider is an employee of "I, Brute" Enterprises Incorporated but holds no ownership interest in any of the aforementioned entities.

[2] References to the Record are to the Appendix filed by Respondents with the Second Circuit Court of Appeals.

"mental strength, visualization, effort, persistence, belief and training methods," when, in fact, the only way to achieve the massive muscle size pictured in Respondents' publications was through the use of steroids. R-73.

SUMMARY OF ARGUMENT

Petitioner seeks certiorari based largely on his claim that he is a victim of an endemic prejudice which exists throughout the judicial system against *pro se* litigants. Petitioner's argument is based in large part on the fact that his Amended and Supplemented Complaint was dismissed by the District Court, and that the dismissal was upheld by the Second Circuit Court of Appeals. The dismissal of Petitioner's complaint, however, was well-grounded in law, and the result would have been the same had Petitioner been represented by counsel. Therefore, even if there were a bias among courts against *pro se* litigants, this is not an appropriate case for review.

Moreover, Petitioner failed to raise the issue of bias before the District Court or the Court of Appeals, and the issue of bias was not decided by either of these courts. Therefore, the issue of bias is not properly before this Court.

Finally, Petitioner has not raised an issue of the type for which certiorari is generally granted. Petitioner has not raised any issue regarding which the courts of appeal are divided; nor is the decision of the District Court and Court of Appeals a departure from the usual course of proceedings.

ARGUMENT

I. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW ON WRIT OF CERTIORARI

A. The Decisions Of The Courts Below Were Well-Grounded In Law

Petitioner asserts that certiorari is warranted because the decision to dismiss his Amended and Supplemented Complaint

was based on an alleged bias by the District Court and the Court of Appeals against *pro se* litigants. Petitioner's argument is based, in large part, on Petitioner's position that the judgments of the courts below were contrary to law. However, the District Court, in its opinion dismissing Petitioner's complaint, gave cogent, proper explanations for its dismissal of each of the counts of that complaint. The opinion of the District Court had a solid foundation in legal precedent, and contains numerous citations to supporting legal authority.[3] The Court of Appeals properly affirmed for substantially the same reasons set forth by the District Court.[4]

Moreover, the history of this litigation makes clear that Petitioner has been given every opportunity to present his case. Plaintiff moved to amend or supplement his complaint no less than eight times. On December 3, 1992, the District Court granted Petitioner's first five motions to amend and supplement. (R-55). In its opinion dismissing Petitioner's Amended and Supplemented Complaint, the District Court granted the Petitioner's remaining motions to supplement, and stated that the supplements had been considered in its ruling on Respondents' Motion to Dismiss. (Petitioner's Appendix, at 11A-12A). The District Court also granted Petitioner's Motion for Leave to File a Reply to Respondents' Motion to Dismiss, which was also considered by the court in rendering its decision on Respondents' Motion to Dismiss. (Petitioner's Appendix, at 11A).

This is not a case in which a *pro se* litigant was the victim of biases or prejudices of the courts below. Petitioner's complaint, and his arguments in opposition to Respondents' Motion to Dismiss, were given every consideration. Petitioner simply failed to state a claim upon which relief can be granted.

---

[3] The District Court's opinion is set out at 3A-12A of the Appendix to Petitioner's Petition for Writ of Certiorari.

[4] The opinion of the Court of Appeals is set out at 1A-2A of the Appendix of Petitioner's Petition for Writ of Certiorari.

B. Petitioner Has Not Raised An Issue Of The Character For Which Certiorari Is Generally Granted

Rule 10.1(a) of the Rules of this Court states that, in general, a decision of a United States court of appeals is considered for review when: (1) the decision is in conflict with decisions of another court of appeals on the same issue; (2) when a decision on a federal question conflicts with the decision of a state court of last resort; or (3) when the decision evidences such a departure from the accepted and usual course of proceedings that supervision is warranted. None of these circumstances is present in this case.

The decision of the Second Circuit Court of Appeals does not conflict with decisions of any other court of appeals and does not address any federal question. Nor is this a case in which the District Court or the Court of Appeals departed from the accepted course of proceedings. As discussed above, the decisions of the District Court and the Court of Appeals were well-grounded in law, and Petitioner was granted every opportunity to present his case. Accordingly, this case raises no issue of the type generally accepted for review by this Court, and for this reason alone the Petition for Writ of Certiorari should be denied.

II. PETITIONER FAILED TO RAISE HIS BIAS ISSUE BELOW

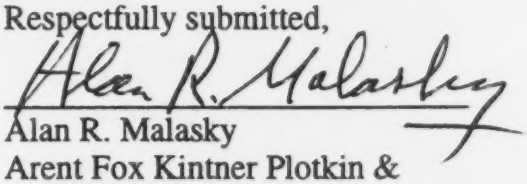
As a general rule, this Court has refused to consider issues which were neither raised nor addressed below. *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). Petitioner in this case never once raised the issue of bias below. While his Petition to this Court discusses recusal at length, Petitioner never sought to recuse any of the judges in the courts below. Nor did Petitioner ever complain of bias in any of his submissions to either the District Court or the Court of

Appeals. Petitioner's failure to raise the issue of bias at any point in the proceedings below is further reason to deny the instant Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Attorney for Respondents

September 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Opposition to Petition for Writ of Certiorari was served this 19th day of September, 1994, by first-class mail, postage prepaid, upon the following:

John J. Kozelka
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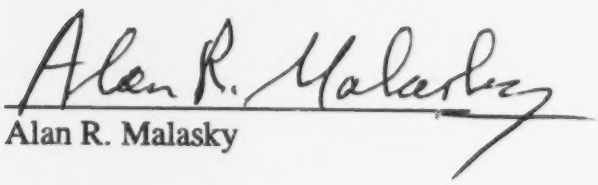

Alan R. Malasky

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Supreme Court, U.S.
FILED
OCT 4 1994
OFFICE OF THE CLERK

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondents, in their Brief in Opposition, disparage the propriety of granting certiorari by misapplying the principles applicable to ordinary bias, ignoring the fact that pro se bias is fundamentally different, which negates the use of normal bias procedures. Respondents exploit the justifiable dismissal of six of Petitioner's claims, to obscure the fact that three solidly based counts of Petitioner's Complaint were dismissed on sham and frivolous grounds contrary to all principles of law, equity and human sensibility. In a further attempt to oppose the granting of certiorari, Respondents highlight a facade of justice enacted by the District Court, wherein rulings favorable to Petitioner were entered in numerous trivial matters which could later be rendered moot by ultimate action on the critical issues. Finally, Respondents im-

ply that certiorari is barred in the foregoing case by distorting Supreme Court Rule 10.1, adding their own interpretation to segments of the Rule taken out of context.

I. PETITIONER'S FAILURE TO RAISE THE BIAS ISSUE IN THE LOWER COURTS SUPPORTS THE GRANTING OF CERTIORARI.

A. THE BIAS ISSUE WAS NOT RAISED BECAUSE THE LOWER COURTS HAVE NO PROCEDURE APPLICABLE TO THE PRO SE BIAS PROBLEM.

1. The implication raised by Respondents that Petitioner should have moved for recusal relative to the allegation of pro se bias is frivolous to the point of incoherence (Brief in Opposition, p. 5, ¶3). As previously set forth and explained by Petitioner, recusal procedures are useless in cases of pro se prejudice since the factors producing the bias are identically present in each and every judge [Petition, Section I(B), ¶¶4, 11, pp. 12, 19].

B. THE PRO SE BIAS ALLEGED BY PETITIONER WAS NOT FULLY APPARENT AS AN INDISPUTABLE FACT PRIOR TO THE RULING OF THE SECOND CIRCUIT COURT OF APPEALS.

1. The Cases of *FTC v. Grolier, Miree v. DeKalb County* and *Rogers v. Lodge* were incorrectly applied by Respondents in the foregoing instance. These cases involve the raising of issues concerning facts and circumstances which had fully transpired and were fully apparent at the district and circuit appellate court levels. In the foregoing case, the facts giving rise to the allegation of pervasive bias had not fully transpired prior to the biased ruling of the court of appeals in the instant matter. This Court has considered and does consider issues not raised in the courts below in cases where exceptional circumstances are present. *Lawn v. United States* (1958), 355 U.S. 339, 362-363, n. 16; *United Brotherhood of Carpenters v. United States* (1947), 330 U.S. 395, 412; *West v.*

Rutledge Timber Co. (1917), 244 U.S. 90, 99-100; *United States v. Tennessee & Coosa Railroad Co.* (1900), 176 U.S. 242, 256; *Duignan v. United States* (1927), 274 U.S. 195, 200.

2. The action of a single judge is insufficient grounds for an allegation of pervasive bias. The accusation of a universal policy of bias can only be substantiated by evidence accrued from a multiplicity of judges and court systems. This precludes possibility that the instant bias issue could have been properly raised prior to judgement by the Court of Appeals.

C. RESPECT FOR THE JUDICIARY DEMANDED WITHHOLDING THE ALLEGATION OF PRO SE BIAS PENDING ABUNDANT ACCUMULATION OF EVIDENCE.

1. The respect which every citizen owes the authorities of this nation dictates that a person err in the direction of restraint, if necessary, to avoid possibly defaming our judicial body by erroneous allegations. The utmost in restraint and caution was desirable before raising the pro se bias issue since this allegation, alleging a pervasive policy of bias, can easily be misconstrued as attacking the integrity of the entire legal system.

II. RESPONDENTS' NEGATION OF DEPARTURE FROM ACCEPTED PROCEEDINGS IS A BALD ASSERTION DEVOID OF ANY SUPPORTING FACTS, ARGUMENT OR AUTHORITY.

1. Six of Petitioner's claims (Counts I, IV, VI, VII, VIII and IX) were dismissed with "cogent, proper explanations" having a "solid foundation in legal precedent" and with accurately applied "citations to supporting legal authority." This action was used as a screen to camouflage the dismissal of three solidly based causes of action (Counts II, III, and V) using "explanations" devoid of any legal precedent, supporting authority or coherent reasoning (App. Pet. 6A, ¶4; 7A, ¶ 1; 9A, ¶1; 10A, ¶¶1-3; 11A, ¶¶1-2).

2. The District Court's repudiation of the outrageousness of Respondents' actions and of the foreseeability of Petitioner's injuries were assertions of personal opinion contrary to normal human sensibilities and in defiance of expert testimony supporting the opposite conclusion [Petition, Section II(D), ¶¶1-2, pp. 24-25].

3. The District Court's denial of the existence of acts taken in reliance on fraud, in contradiction to Petitioner's clear allegation that such acts were taken, can be logically interpreted only as a judgement against the truthfulness of Petitioner's assertions. [Petition, Section II(D), ¶3, p.25].

4. The District Court's "libel claim" argument, used to dismiss count V of Petitioner's Complaint, defies all principles of law, equity and reason. [Petition, Sections II(A), II(B) and II(C), pp.21-24].

5. The District Court's rulings on outrage, foreseeability and acts in reliance on fraud effectively usurp the role of jury in violation of Article VII of the Amendments to the United States Constitution (App. Pet. 14A).

6. Although Respondents repeatedly proclaim that the

District Court's rulings were well founded in law and supported by valid argument, it is Petitioner who cites authority and gives argument refuting the District Court's action [Petition, Sections II(A), II(B) II(C) and II(D), pp. 21-25]. Respondents neither cite authority nor attempt any argument by way of rebuttal in support of the District Court.

III. GRANTING PETITIONER "EVERY OPPORTUNITY TO PRESENT HIS CASE" WAS MERELY A DECEPTIVE MANEUVER, INTENDED TO EFFECT AN ILLUSION OF JUSTICE.

1. The truth that Petitioner was given "every opportunity to present his case" is immaterial to the fact that, after presenting his case, his action was dismissed without any proper grounds using sham, specious or utterly incoherent arguments. Granting Petitioner the unlimited right to amend and supplement his Complaint and to file supporting exhibits and affidavits was rendered moot by dismissing three solidly based claims with arguments which, if valid, could support dismissal of any claim ever stated for fraud, negligence or infliction of mental distress [Petition, Sections II(A), II(B), II(C) and II(D), pp. 21-25].

2. There is no indication whatsoever, other than words stated by the District Court, that any additional materials submitted and filed by Petitioner were "considered" relative to ruling on Respondents' Motion to Dismiss (App. Pet. 8A, ¶1; 11A, ¶4; 12A, ¶¶1-3). The least consideration given to the Affidavit of Frank Gancarz as expert testimony would have established the outrage and foreseeability questions to be jury matters and would have barred the complete dismissal of Petitioner's Complaint [Petition, Section II(D), ¶¶1-2, pp.24-25]. Furthermore, the least consideration given to Respondents' steroid instruction guide and to Petitioner's letters written to Respondents, also filed and accepted as exhibits, would have had the same result relative to outrage and foreseeability and barred complete dismissal of Petitioner's case (Petition, Section IV, pp. 27-28; App. Pet. 17A-24A; Appx.

19A-37A).

IV. THE CRITERIA FOR GRANTING CERTIORARI SET FORTH IN SUPREME COURT RULE 10.1 ARE BY NO MEANS ALL INCLUSIVE.

1. Rule 10.1 read in its entirety emphasizes the nonspecific criterion of "special and important reasons" as the governing factor for granting certiorari. The specific criteria listed in Sections a, b and c are stated as merely "indicat[e](ing) the character of reasons" that could justify granting the writ. The broad range and nonspecific nature of the criteria are further emphasized by the assertion that the specifically stated reasons are "neither controlling nor fully measuring (of) the Court's discretion." Respondents omit this information attempting to distort the statement of the Rule as giving exclusive and controlling criteria which would bar the granting of certiorari in the instant case.

2. The following facts combine to produce a "special and important reason[s]" for granting certiorari in the foregoing action:

a. Precedents set by this Court showing an inclination to examine cases of apparent pro se bias and reverse the biased rulings constitute the only effective means for rectifying the pro se problem.

b. The present situation of entrenched pro se bias deprives thousands of persons on a daily basis of all their legal rights, of their property and of their finances, and wastes the time and resources of all entities involved in pro se proceedings.

3. The central role in the foregoing case of the issue involving First Amendment publication rights, combined with the conflict and confusion in the courts and the need for precedents of this Court regarding this issue, is certainly of the same "character" as the reasons for granting certiorari listed

in Sections a and c of Supreme Court Rule 10.1 (Petition, Section III, pp.25-27).

4. The involvement of First Amendment rights in the issues of this case, as well as the denial of Constitutional rights caused by the practice of pro se bias, render the case to be "of the character for which certiorari is generally granted", based on the fact of Constitutional involvement alone [Petition, Section I(A), ¶¶1-3, pp. 8-9; Section III, pp.25-27].

> "As the final arbiter of law, the (Supreme) Court. . . . functions as guardian and interpreter of the Constitution."

The Supreme Court of the United States, The Court and Constitutional Interpretation, p.5.

A. THE PRACTICE OF PRO SE BIAS IS UNIVERSALLY KNOWN AND HAS HARMED PUBLIC FAITH IN THE COURT SYSTEMS TO THE POINT WHERE NEED FOR REMEDIAL ACTION IS URGENT.

1. The bias issue itself is divided into the question of actual bias and the direct harm caused by biased rulings, and the separate question of the appearance of bias and the harm inflicted on public faith in the judiciary. Likewise, the issue of harm done to public confidence in the court system divides into two separate factors: (1) the harm which can or will result if remedial action is not taken and (2) the damage already inflicted and present as an existing fact.

2. Any poll taken on the confidence held by the average citizen that a pro se litigant standing next to an opposing attorney will receive equal treatment by the court would reveal a majority opinion lacking faith in the legal system. Thus, the immediate need relative to the appearance and public confidence side of the pro se bias problem is not to preserve or protect an existing faith in the courts. It is an urgent necessity to rebuild the already shattered image of "equal justice under law" in pro se situations.

B. RESPONDENTS' PROMOTION OF SUICIDAL DRUG ABUSE INFLICTING DEATH OR BODILY DAMAGE ON BOTH CHILDREN AND ADULTS IS A "SPECIAL AND IMPORTANT REASON" FOR THE ATTENTION OF THIS COURT.

1. The death dealing and morally corrupt nature of Respondents' abuse of their freedom to publish is shown by consideration of the following facts admitted by Respondents within their magazines and books:

a. That all bodybuilding results portrayed by Respondents, all training programs described by them and all contests promoted and advertised within Respondents' publications are totally dependent upon steroid abuse (App. Pet.18A, ¶¶1-3; 20A, ¶4; 21A, ¶¶4-5).

b. That the steroid dosages needed to produce the results advertised by Respondents are between seven (7) and sixteen (16) times the dosage which a reputable physician would prescribe and administer legally. (See App. Pet. 23A, ¶2. Compare steroid dosage of 100 milligrams per day [700 milligrams per week] recommended in steroid program outlined in Competitive Bodybuilding with maximum recommended dosages of anabolic steroids Winstrol [Stanozolol - 6 milligrams per day] and Durabolin [Nandrolone Phenpropionate - 100 milligrams per week] given in pharmaceutical manual Facts and Comparisons [App. Pet. 26A-27A]. Note Illustrations of drugs Winstrol and Durabolin portrayed in Competitive Bodybuilding [App. Pet. 17A].)

c. That numerous teenagers and children are drawn into steroid use by viewing Respondents' publications (App. Pet. 33A, ¶1).

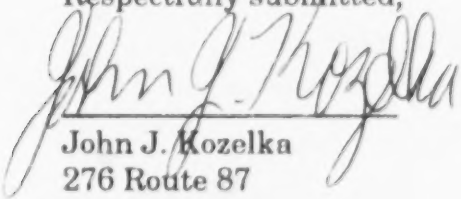
d. That the steroid use promoted, encouraged and instigated by Respondents results in widespread bodily damage and death (App. Pet. 20A, ¶3; 22A, ¶2; 24A, ¶3; 28A, ¶2; 29A, ¶¶4-7; 30A, ¶2; 31A, ¶¶5-6; 33A, ¶¶2-3; 34A, ¶1).

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, Petitioner respectfully requests that a writ of certiorari be issued to review the order and judgement of the United States Court of Appeals for the Second Circuit relative to the above-entitled action, that the Questions Presented be decided by this Court, and that the foregoing case be remanded to the District Court for trial.

Dated this 4th day of October, 1994.

Respectfully submitted,



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